Supreme Court of the United States

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

vs.

NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

INDEX

	Page
Record of Conviction	1
Indictment	1
Docket Entries (Excerpts)	9
Arraignment and Plea of "Not Guilty"	9
Appearance of Counsel	10
Motions to Inspect Grand Jury Minutes and for Suppression of Evidence	11
Swearing of Trial Jurors followed by discharge of Sworn Jurors due to medical indisposition of Trial Judge	12
Docket Entries of Trial	13
Judgment of Conviction, Motions by Defense, and Sentence	15
Application by an Assistant District Attorney for an Order of the County Court to intercept telephone communications transmitted over telephone number 212 LW 4-2523	17
Ex Parte Hearing upon application for Order of County Court to intercept telephone communications transmitted over telephone number 212 LW 4-2523	20

Order of County Court, dated July 1, 1964, for interception of telephone communications over telephone number 212-LW 4-2523 ____ 41

Order of County Court, dated July 1, 1964, for interception of telephone communications over telephone numbers 212 CA 6-8509 and 212 CA 6-8854 ____ 43

Defendant's Motion, returnable September 2, 1964, for inspection of the Grand Jury Minutes and Dismissal of the Indictment. ____ 45

Notice of Motion and Supporting Affidavit ____ 45

Memorandum Decision of County Court denying Motion. ____ 49

Defendant's Motion, Returnable November 10, 1964, for Suppression of all wiretap evidence. ____ 49

Notice of Motion and Supporting Affidavit ____ 50

Opinion by County Court denying Motion ____ 56

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966 ____ 62

Appearances ____ 62

Defendant's Motion for a Hearing as to the Admissibility of the wiretap evidence, Colloquy and Argument ____ 62

Transcript of Wiretap Hearing ____ 70

Exclusion of Jury ____ 70

Colloquy ____ 70

Court Order for wiretap of telephone number 212-LW 4-2523, and Petition therefor, marked People's Hearing Exhibit 1 in evidence. ____ 76

Court order for wiretap of telephone numbers 212-CA 6-8509 and CA 6-8854 marked People's Hearing Exhibit number 2 in evidence. ____ 77

Testimony of Donald J. White ____ 77

Direct ____ 78

Transcript of *Ex Parte* Hearing upon application for wiretap order (212 LW-4-2523) marked as People's Hearing Exhibit 1A for identification ____ 80

Transcript of Ex Parte Hearing upon application for wiretap order (212 CA 6-8509 and CA 6-8854) marked as People's Hearing Exhibit 2A for identification. ____ 80

Colloquy ____ 81

Cross ____ 83

Page

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966—Continued

People's Hearing Exhibit 1A and 2A received and marked in evidence 83

Defendant's Motion for Suppression of the wiretap evidence 84

Argument by Mr. Bouse 84

Argument by Mr. Doolittle 89

Argument by Mr. Bouse 93

Denial of Motion to Suppress by the Court 97

Transcript of Trial (Excerpts) 98

Opening on Behalf of People 98

Opening on Behalf of Defendant 106

People's Exhibits 1 thru 8 marked for identification (reels of recording tape) 111

People's Exhibit 9 marked for identification (reel of recording tape) 112

People's Exhibit 10 marked for identification (reel of recording tape) 113

People's Exhibit 11 marked for identification (County Court Order of July 1, 1964, authorizing the wiretapping of telephone number 212 LW 4-2523) 114

People's Exhibit 12 marked for identification (County Court Order of July 1, 1964, authorizing the wiretapping of telephone numbers 212-CA 6-8509 and CA 6-8854) 115

Testimony of John Donovan 115

Direct 115

Cross 122

Colloquy and Specification of various objections by the Defense 126

Cross (continued) 132

Redirect 134

Recross 135

Testimony of William J. Beach 136

Direct 136

Cross 139

Redirect 142

Recross 142

Page

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966—Continued
Testimony of Clifford Crawford ... 143
Direct ... 143
People's Exhibits 11 and 12 for identification, marked in evidence. (Court Orders authorizing wiretapping) ... 144
Cross ... 146
Redirect ... 148
Testimony of John Skuzenski ... 149
Direct ... 149
Cross ... 152
Redirect ... 154
Recross ... 155
Testimony of Thomas Costello ... 156
Direct ... 156
Cross ... 162
Testimony of Frank Vedder ... 167
Direct ... 167
Cross ... 169
Redirect ... 171
Continuing Objection registered by the Defense ... 172
Testimony of Donald J. White ... 172
Direct ... 172
People's Exhibits 1A through 8A, inclusive, marked for identification (transcripts of taperecorded conversations) ... 174
People's Exhibit 9A marked for identification (transcript of taperecorded conversation) ... 175
People's Exhibit 9B marked for identification (transcript of taperecorded conversation) ... 176
People's Exhibit 10A marked for identification (transcript of taperecorded conversation) ... 176
Cross ... 177
Redirect ... 182
Recross ... 184

Page

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966—Continued

Testimony of Joseph Tozzi 186
Direct 186
Cross 190
Hearing, out of the presence of the Jury, for the Court and Defense to hear the playing of People's Exhibits 1 thru 10. 195
People's Exhibit 10 is played. 196
People's Exhibit 9 is played 198
Colloquy 198
Finding of the Trial Court as to the Quality of the recordings. 211
Objections of the Defense as to the Admissibility of People's Exhibits 1 thru 10. 212
Testimony of Ruth Holtzman (Extract) 219
Direct 220
Testimony of Ann Rettek ..... Not Printed
Testimony of Louis Druckman ..... Not Printed
Testimony of Rocky Graziano ..... Not Printed
Testimony of Dolores Billings ..... Not Printed
Testimony of Ronald Billings ..... Not Printed
Testimony of Irving Holtzman 220
Direct 220
Hearing, out of the presence of the Jury, at which the witness identified the various voices which appeared on People's Exhibits 1 thru 10 for identification 222
Identification of voices appearing on People's Exhibit 9A 224
Identification of voices appearing on People's Exhibit 9B 226
Fourteen duplicate copies of People's Exhibits 9A and 9B marked for identification. 227
People's Exhibits 9, 9A, and 9 A1 thru 9A14, inclusive, received and marked in evidence. 230
That portion of People's Exhibit 9 which reflected People's Exhibit 9A played for the Jury. 230

Page

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966—Continued
Testimony of Irving Holtzman—Continued
Direct—Continued
People's Exhibits 9B, 9B1 thru 9B14, inclusive, received and marked in evidence. 232
That portion of People's Exhibit 9 which reflected People's Exhibit 9B played for the Jury. 233
The People Rested 233
Defendant's Motion for Dismissal of the Indictment 233
Argument by Mr. Bouse 233
Argument by Mr. Doolittle 238
Argument by Mr. Bouse 241
Reservation of Decision by the Court 243
Denial of Motion by the Court 243
Testimony of Mendy Ohrwaschel Not Printed
Testimony of Irwin Schwartz Not Printed
Testimony of Louis Weiman Not Printed
Testimony of Rita Dowd Not Printed
Testimony of David Marlin Not Printed
Testimony of Lillian Kaiser Not Printed
Testimony of Thomas R. Kaiser Not Printed
The Defendant Rested 243
The People Rested 243
Defendant's Motions for a Directed Verdict of Acquittal 244
Reservation of Decision by the Court 246
Denial of Motions by the Court. 247
Summation in behalf of the People (Extracts) 247
Motion for a Mistrial by the Defendant 250
Denial of Motion by the Court 253
Court's Charge to the Jury (Extracts) 254
Retirement of the Jurors 261
Requests by the Jurors for Instructions from the Court 261
Requests by the Jurors for the rehearing of People's Exhibits 9A and 9b 262

Page

Excerpts from Transcript of Trial and Trial Hearings, May 31, 1966—Continued

Requests by the Jurors for Instructions from the Court. 263

Retriement of the Jurors 264

Requests by the Jurors for Instructions from the Court 264

Retirement of the Jurors 264

Verdict of the Jury 264

Motion by the Defendant for Arrest of Judgment 266

Denial of Motion by the Court 266

Motion by the Defendant that the judgment be set aside 266

Denial of Motion by the Court 266

Sentence of the Court 267

Text of People's Exhibit 9A in Evidence 269

Text of People's Exhibit 9B in Evidence 280

Notice of Appeal to the Appellate Division of the Supreme Court, Second Judicial Department 297

Order of the Appellate Division of the Supreme Court, Second Judicial Department, Affirming the Judgment of Conviction. 298

Certificate of Hon. Stanley H. Fuld, Chief Judge of the New York State Court of Appeals, granting the Appellant, Thomas R. Kaiser, leave to appeal to the Court of Appeals and fixing bail pending appeal. 300

Notice of Appeal to the Court of Appeals of the State of New York 301

Remittitur of the Court of Appeals 303

Majority Opinion in the Court of Appeals, Keating, J. 305

Dissenting Opinion in the Court of Appeals, Fuld, Ch. J 321

Order of the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals, staying the judgment of the Court of Appeals and admitting the Appellant to bail, pending the filing of a Petition for Certiorari with the Supreme Court of the United States. 329

Order allowing certiorari 331

[RECORD OF CONVICTION]

STATE OF NEW YORK
COUNTY OF NASSAU

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS R. KAISER

True Name

THOMAS ROGER KAISER

CERTIFIED COPY
—of—
RECORD OF CONVICTION

---

* * * *

[INDICTMENT]

COUNTY COURT : COUNTY OF NASSAU

THE PEOPLE OF THE STATE OF NEW YORK

—*against*—

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE,

also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE, and DANIEL ROE being to this Grand Jury unknown, of the crime of CONSPIRACY in Violation of Section 580-a of the Penal Law of the State of New York, committed as follows:

The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, from on or about and between the 1st day of May, 1964 to the 15th day of July, 1964, did wilfully, maliciously, feloniously, wrongfully, unlawfully and corruptly, combine, confederate, conspire and agree together to extort money feloniously and unlawfully from Irving Holzman.

The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, did do and commit the following acts in pursuance and furtherance of said conspiracy and to effect the objects thereof:

1. Between on or about the 1st day of May, 1964 and the 15th day of July, 1964, said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, did

threaten to do physical harm to Irving Holzman and other members of his family unless said Irving Holzman agreed to pay to the said defendants the sum of $25,000 lawful currency of the United States of America, and to further give to said defendants 25% of the income of his various business enterprises in the coin machine industry.

2. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did on or about the 8th day of June, 1964 assault one Ruth Holzman, the wife of Irving Holzman, at 155 Sycamore Drive, Roslyn, County of Nassau, State of New York, by threatening her and striking her with a dangerous weapon, to wit, a pistol, and by pushing and beating her.

3. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did on or about the 2nd day of July, 1964 have a telephone conversation with Irving Holzman and did threaten him with grievous bodily harm to himself and his family.

4. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, on or about the 30th day of June, 1964, each aiding and abetting the other and acting in concert, did make a telephone call to Dolores Billing, the daughter of Irving Holzman, at her home at 65 Sylvia Lane, Plainview, County of Nassau, State of New York, and stated

to her that if her father did not cooperate "they would come to Sylvia Lane and kick her fucking pregnant belly in".

5. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did have divers conversations among themselves and with others in which their plans to extort money from Irving Holzman were discussed.

SECOND COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ATTEMPTED EXTORTION in Violation of Sections 850 and 851 of the Penal Law of the State of New York, committed as follows:

On or about and between the 1st day of May, 1964 and the 15th day of July, 1964, in the County of Nassau and elsewhere in the State of New York, the said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did wilfully, unlawfully and feloniously attempt to obtain the sum of $25,000 lawful currency of the United States of America and 25% of the income of the various business enterprises of Irving Holzman in the coin machine industry,

the property of said Irving Holzman, with the consent of said Irving Holzman, said consent being then and there induced by a wrongful use of force and fear.

THIRD COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of COERCION in Violation of Section 530 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, on or about and between the 1st day of May, 1964 and the 15th day of July, 1964, with a view to compel one Irving Holzman to do an act which the said Irving Holzman had a lawful right to abstain from doing, namely, to pay to the said defendants the sum of $25,000 lawful currency of the United States of America and 25% of the income from the business enterprises of the said Irving Holzman, did wrongfully and unlawfully use and attempt the intimidation of the said Irving Holzman by threats of force, namely, to do physical injury to said Irving Holzman and members of his family unless he, the said Irving Holzman, should pay to the said defendants the said sum of money and 25% of the income from his various business enterprises in the coin machine industry.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ASSAULT in the SECOND DEGREE in Violation of Section 242 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, wilfully and wrongfully assaulted one Ruth Holzman by the use of a weapon and other instrument and thing likely to produce grievous bodily harm.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATROE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ASSAULT in the SECOND DEGREE in Violation of Section 242 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as

Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, wilfully and wrongfully assaulted one Ruth Holzman with intent to commit a felony.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of BURGLARY in the SECOND DEGREE in Violaltion of Section 403 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, with intent to commit therein the crime of Extortion, broke and entered the dwelling house of Irving Holzman, there being therein at the time a human being.

All of the acts and transactions alleged in each of the several counts of this indictment are connected together and form part of a common scheme and plan.

Dated: July 16, 1964.

/s/ William Cahn
WILLIAM CAHN
District Attorney

No. 20122

Bond

Filed day of 19

Pleads

COUNTY COURT

NASSAU COUNTY

THE PEOPLE

vs.

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

WILLIAM CAHN
District Attorney

Indictment for

Consp., Att. Ext., Coercion, Assault 2nd (2 cts.), Burg. 2nd.

A TRUE BILL

/s/ Richard S. Ferris
RICHARD S. FERRIS
Foreman

Counsel,

Tried the day of 19

Verdict,

Sentenced,

[EXCERPTS FROM DOCKET ENTRIES]

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. HAROLD M. SPITZER, COUNTY JUDGE OF NASSAU COUNTY

JUL 16 1964

Indictment # 20122

THE PEOPLE OF THE STATE OF N.Y.

-*vs.*-

THOMAS R. KAISER

Norman Levy
Ass't District Attorney

Michael J. Capanegro
Counsel for Deft.

The said Thomas R. Kaiser having on July 16, 1964, been indicted for Conspiracy in Vio Sect. 5800 of P.L.; attempt extortion in Vio. of Sect. 850 & 851 of P.L. of State of N.Y.; Coercion in Vio. of Sect. 530 P.L. of State of N.Y.; Assault 2nd Degree in Vio Sect. 242 of P.L. of State of N.Y. 62 Counts; Burglary 2nd Degree in Vio. Sect. 403 of P.L. of N.Y. State was arraigned before the Court.

Before pleading to the indictment the defendant was informed of his right to counsel and of Sec. 335-B of C.C.P. and further asked if he desired the aid of counsel.

The defendant did not ask for the aid of counsel.

The defendant entered a plea of not guilty as charged. Remanded to County Jail Pending Trial—Bail Fixed at $25,000.—

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. JAMES L. DOWSEY, COUNTY JUDGE OF NASSAU COUNTY

APRIL 13th, 1965

Indictment # 20122

PEOPLE

v.

THOMAS R. KAISER

Warren Doolittle
Asst D.A.

Irwin L. Germaise,
by Saul Haring

Mr. Haring appeared in Court and filed a notice of appearance by Irwin L. Germaise, to represent the defendant Thomas R. Kaiser.

Mr. Haring then moved to reinstate bail bond that was forfeited on April 12, 1965.

Motion denied without prejudice to renew on proper application.

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. JAMES L. DOWSEY, COUNTY JUDGE OF NASSAU COUNTY

NOVEMBER 15th, 1965

Indictment # 20122

PEOPLE

v.

THOMAS R. KAISER

Trial adjourned to March 28, 1966, the defendant having submitted two motions to the Court (1) to inspect Grand Jury minutes and (2) to suppress evidence.

District Attorney to answer by Nov. 18, 1965, and defendant to reply by Nov. 22, 1965.

Bail Bond continued.

the 18th, 19th, 20th, 23rd, 24th, 25th and 26th days of May, 1966.

PRESENT: Hon. James L. Dowsey, County Judge of Nassau County.

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS R. KAISER

Warren Doolittle,
Assistant District Attorney

F. Courts Bouse, Esq.

Defendant charged with Consipracy in Violation of Section 580-A of the Penal Law of the State of New York; Attempted Extortion in Violation of Section 850 and 851 of the Penal Law of the State of New York; Coercion in Violation of Section 530 of the Penal Law of the State of New York; Assault 2nd degree in Violation of Section 242 of the Penal Law of the State of New York (2 counts); and, Burglary 2nd degree in Violation of Section 403 of the Penal Law of the State of New York.

Case called for Trial. Both sides ready. Defendant informed of Section 369 of C. C. P.

May 25th, 1966: Jury duly drawn, called and sworn, or affirmed. Case continued to May 26th, 1966 for selection of 2 or more alternate juriors. Bail Bond continued.

May 26th, 1966: Hon. James L. Dowsey, having been advised he would have to be hospitalized for immediate surgery, discharged the twelve sworn jurors and the panel of prospective alternate jurors. Defendant continued on bail.

6th, 7th, 8th, 10th, 13th, 14th, 15th, 16th, 20th, 21st, 22nd, 23rd, 27th, 28th, 29th and 30th days of June and the 5th and 6th days of July, 1966.

PRESENT: Hon. Albert A. Oppido, County Judge of Nassau County.

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS R. KAISER

True Name: THOMAS ROGER KAISER

Warren Doolittle,
Assistant District Attorney

F. Courts Bouse, Esq.

May 31st, 1966: Defendant charged with Consipracy in Violation of Section 580-A of the Penal Law of the State of New York; Attempted Extortion in Violation of Section 850 and 851 of the Penal Law of the State of New York; Coercion in Violation of Section 530 of the Penal Law of the State of New York; Assault 2nd degree in Violation of Section 242 of the Penal Law of the State of New York (2 counts); and, Burglary 2nd degree in Violation of Section 403 of the Penal Law of the State of New York.

Case called for re-trial. People answered "Ready". Mr. Bouse then requested he be permitted to make motions. Granted.

Jury panel for this case excused from the Courtroom. In the absence of the Jury panel, Mr. Bouse requested a reasonable delay in the start of the case so that he could properly prepare motion papers for dismissal on the grounds of double jeopardy, as fully appears in the record. Decision Reserved. (June 1st, 1966: Motion denied). Mr. Bouse then moved for a hearing on any wire taps to be offered into evidence against defendant. Decision Re-

served. Court directed that a hearing be held on any wire-taps evidence to be offered in the case.

June 1st, 1966: Jury panel excused from the Courtroom. Hearing on admissability of wiretap evidence commenced.

By the Court: The Court finds that there were reasonable grounds for the granting by the Court of the wiretap order.

Panel of jurors returned into Court. Both sides answered "Ready" for trial.

Defendant informed of Section 369 C. C. P.

June 7th, 1966: This cause having been called in its regular order on the Calendar, on motion of Warren Doolittle, Assistant District Attorney for the People ordered that a jury be called and sworn or affirmed, and cause tried.

Mr. Bouse moved for re-consideration of the question of double jeopardy hereto raised, on all grounds fully stated in the record. Motion denied.

July 6th, 1966: The Jury again returned into Court and upon being duly called, did say they find the defendant "guilty" of Counts 1, 2, and 3 and "not guilty" of Counts 4, 5 and 6.

Mr. Bouse moved that the Jury be polled. Jury polled, all 12 jurors answering in the affirmative.

Pedigree taken. Motion to amend to true name, THOMAS ROGER KAISER, granted.

Remanded for sentence August 12, 1966. Jury discharged.

COUNTY COURT TRIAL TERM NASSAU COUNTY

AUG 12 1966

PRESENT: HON. ALBERT A. OPPIDO, COUNTY JUDGE OF NASSAU COUNTY.

Ind # 20122

The People of the State of New York:

vs. Thomas Roger Kaiser (Sebastian [illegible] Kaiser) : [illegible] District Attorney: W. Turner

F. Courts Bouse

The said Thomas Roger Kaiser having on July 6th 1966 been found Guilty of Ct 1 - Conspiracy in Vol of Sec. 580-A of P.L. Ct 2 - attempted Extortion in Vol of Sec. 850 + 851 of P.L. Ct 3 - Coercion in Vol of Sec. 530 of P.L. by a verdict of a jury, was arraigned before the Court.

Mr. Bouse moved for an arrest of judgment, and to set aside the verdict as against the weight of evidence etc and also on the grounds that this Court was without jurisdiction to have tried this case etc, as fully appears in the record. Motions denied.

The following question was asked the defendant: Have you any legal cause to show why judgment should not be pronounced against you? The defendant answered "No".

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kaiser for the felony, Conspiracy in Vol Sec. 580-A of Penal Law aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be Seven years Two months and the minimum One years Six months thereof.

And it is further

Whereupon ~~it is~~ Ordered and Adjudged by the Court, that the said Thomas Roger Kaiser for the felony, attempted Extortion in Vol of Sec. 850 + 851 of the Penal Law aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be Seven years Two months and the minimum One years Six months thereof.

And it is further Ordered that this sentence be served concurrently with the sentence imposed for Conspiracy in violation of Section 580-A of the Penal Law.

And it is further

~~Whereupon it is~~ Ordered and adjudged by the Court that

[illegible] of New York.

vs. Thomas Roger Kaiser (Adelaide [illegible] Kaiser) : and District Attorney: W. Turner

F. Courts Bouse

The said Thomas Roger Kaiser having on July 6th 1966 been found Guilty of Ct 1 - Conspiracy in Vol of Sec. 580-A of P.L. Ct 2 - attempted Extortion in Vol of Sec. 850 + 851 of P.L. Ct 3 - Coercion in Vol of Sec. 530 of P.L. by a verdict of a jury, was arraigned before the Court.

Mr. Bouse moved for an arrest of judgment, and to set aside the verdict as against the weight of evidence etc and also on the grounds that this Court was without jurisdiction to have tried this case etc, as fully appears in the record. Motions denied.

The following question was asked the defendant: Have you any legal cause to show why judgment should not be pronounced against you? The defendant answered "No".

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kaiser for the felony, aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be Seven years Two months and the minimum Three years Six months thereof.

Conspiracy in Vol Sec. 580-A of Penal Law

And it is further

Whereupon ~~it is~~ Ordered and Adjudged by the Court, that the said Thomas Roger Kaiser for the felony, aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be Seven years Two months and the minimum Three years Six months thereof.

attempted Extortion in Vol of Sec. 850 + 851 of the Penal Law

And it is further Ordered that this sentence be served concurrently with the sentence imposed for Conspiracy in violation of Section 580-A of the Penal Law.

And it is further

~~Whereupon it is~~ Ordered and adjudged by the Court that sentence be suspended upon the said Thomas Roger Kaiser for the Crime of Coercion in Vol of Sec. 530 of P.L. aforesaid whereof he is convicted.

And it is further Ordered that the Defendant be held in the Nassau County Jail, pending application for a certificate of Reasonable Doubt.

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
Norman J. Levy *, an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

212 LW 4-2523

The petition of *Norman J. Levy* respectfully shows and alleges:

1. That your petitioner is over twenty-one years of age and resides at *120 Wynsum Avenue, Merrick*, Nassau County, New York, and that since *January 12, 1959* your petitioner has been and is an Assistant District Attorney of Nassau County:

2. That your petitioner is actively engaged in the investigation of crimes committed in violation of the Penal Law of the State of New York, and particularly in the investigation of the crimes of *Attempted Extortion, Conspiracy to Commit the Crime of Extortion and Conspiracy to Commit a Crime* which your petitioner has good and sufficient reason to believe is being committed in Nassau County, New York.

3. That in connection with the aforesaid investigation, petitioner has been conducting an investigation of the criminal activities of *Salvatore Granello, Dino Conte* and John Doe and Richard Roe (said names of John Doe and Richard Roe are fictitious; their true names and identity being unknown to your petitioner) who, your petitioner is informed and believes, have bave been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as participants or as material witnesses, have knowledge or information regarding said

(* This is a form petition and the filled in blanks are here designated by italic.)

crime and are in communication by telephone with other persons having such knowledge and information.

4. That *HEADLINE BAR* has a telephone at *255 West 43rd Street, New York County, New York*, the number of which is *212 LW 4-2523* and that your petitioner is informed and has reason to believe that the said telephone and the communications made over said telephone by the said *Salvatore Granello, Dino Conte* and other persons who use said telephone, are the means of carrying on and promoting criminal activities; and petitioner is informed and has reason to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument, such crimes being in violation of the Penal Law of the State of New York.

5. That no previous application has been made for the order herein applied for.

WHEREFORE, your petitioner prays that an order be made herein under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, authorizing and empowering the District Attorney of Nassau County and your petitioner as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County or of your petitioner as such Assistant District Attorney of Nassau County to intercept and record all telephone communications made by and to the said *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over said telephone located at *255 West 43rd Street, New York* County, New York, now designated as *212 LW 4-2523* from the date of making of such order until, up to, and including *the 29th day of August, 1964.*

/s/ [Illegible]
Petitioner

STATE OF NEW YORK)
) SS.
COUNTY OF NASSAU)

NORMAN J. LEVY being duly sworn, deposes and says:

That he is the petitioner named in and who signed the foregoing petition. That he has read the said petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

/s/ [Illegible]

Sworn to before me this
30th day of *June, 1964.*
NOTARY PUBLIC, STATE OF NEW YORK

/s/ A. Veronica Gallagher
[Expiration Stamp Illegible]

* * * *

DISTRICT ATTORNEY'S INVESTIGATION

RB 2-27-64

212-LW-4-2523

In the Matter of the Application of
Norman J. Levy, an Assistant District Attorney
of the County of Nassau,

—for—

an Order for Interception of
Certain Telephone Communications

County Court, New Courthouse,
Mineola, N.Y., July 1, 1964.

BEFORE:

HON. HAROLD M. SPITZER, County Court Judge.

[In Chambers]

APPEARANCES:

NORMAN J. LEVY, Assistant District Attorney,

Donald J. White, CSR.,
DA Confidential Reporter.

[2] NORMAN J. LEVY, being duly sworn by the Court, testified as follows:

BY THE COURT:

Q State your name and address.

A Norman J. Levy, 120 Winsum Avenue, Merrick, New York. I am an attorney duly licensed and admitted to practice law in the State of New York.

I am and have been an assistant district attorney of Nassau County since January 12, 1959, and I am Chief of the District Attorney's Rackets Bureau.

Since June 8, 1964, I have been conducting an investigation of the crimes of attempted extortion, conspiracy to commit the crime of extortion, conspiracy to commit a crime and felonious assault.

On June 8, 1964, I had a conversation with Irving Holzman who resides at 55 Sycamore Drive, Roslyn, New York. Mr. Holzman resides at 55 Sycamore Drive, Roslyn, with his wife, Mrs. Ruth Holzman.

Mr. Holzman's business is United East Coast Corporation which is located at 583 Tenth Avenue, New York 36, New York. He also maintains a business in the County of Nassau and that business is located at 243 Northern Boulevard, Great Neck.

[3] The nature of Mr. Holzman's business is that he is a distributor of automatic coin machines, juke boxes, game machines, and he is the owner of routes of automatic coin machines locations, juke boxes, game machines and cigarette machines.

Mr. Holzman told me that a principal of one of his juke box routes is one Robert Luttman. Mr. Luttman is also employed by Mr. Holzman as an adjustor and his duties as an adjustor are to adjust problems that arise in connection with automatic coin machine locations that are owned by Mr. Holzman in connection with Mr. Luttman, himself and with others.

Mr. Holzman told me that he became aware that Luttman had gone to a location in the Bronx, the Calypso Lounge, in the end of May, 1964, to adjust a location on behalf of Mr. Holzman. At that location in the Bronx a competitor, Jet Automatic, was seeking to take over a location belonging to Mr. Holzman wherein he had placed an automatic coin machine.

Mr. Luttman went to the Calypso Lounge and spoke with the owner of the premises, and the basis of Mr. Holzman's knowledge is a conversation he had subsequently with Mr. Luttman. This is in regard to the Calypso Lounge.

Mr. Holzman said that Luttman told him that in seek-
[4] ing to keep the location for Mr. Holzman that he, Luttman, had told the owner of the Callypso Lounge that

one Sally Burns was with Mr. Holzman and Mr. Luttman in that location.

Mr. Holzman identified the name Sally Burns as an alias of one Salvatore Granello. Salvatore Granello resides at 215 Mott Street, Apartment A-1 in the Borough of Manhattan in New York City. Salvatore Granello is known through the Intelligence of the District Attorney's Rackets Bureau and Central Intelligence Bureau of the New York City Police Department to be a member of Cosa Nostra.

He is a member of the Thomas Luchesse, alias Three Finger Brown, Family of Cosa Nostra. He is presently under indictment by the federal government, Southern District of New York, and he's charged with income tax evasion.

He's out on bail pending the trial of his case. He has previously been arrested in Orange County for the crime of rape, and he is awaiting trial on that indictment in Orange County.

Mr. Holzman told me that he informed Mr. Luttman that he had had no right to use Sally Burns name in connection with that location or any other location.

Mr. Holzman said that on June 4, 1964, a Thursday, a man came to his New York office located at 583 Tenth Avenue, New York, and identified himself as Dino Conte. [5] Mr. Holzman told me that he believed Conte was a relative of one of his upstate New York customers and as a result spoke with Conte in his office.

At this time Holzman said that Conte indicated that he had been sent by Sally Burns to talk to Holzman. Conte said to Mr. Holzman at that time, "Do you know Charles Morel? Do you know that Playmore is jumping Charles Morel's locations?"

Conte then said to Mr. Holzman, "We're not interested in Morel but the people Morel is with."

A previous investigation by the District Attorney's office has ascertained that Mr. Morel is a principal of Local Vending and that another principal of Local Vending and partner of Mr. Morel's is one Mike Miranda.

Through our intelligence information Michael Miranda has an arrest record. He's previously been arrested twice

for homicide. Both of these charges were dismissed. He has a New York City Police Department B # 129648.

He resides at 167 Greenway North in Forest Hills. Mr. Miranda, according to sworn testimony by Joseph Valachi before the Senate Investigating Committee, is one of the National Commissioners of Cosa Nostra, and he's the advisor or consigilliare to Vito Genovese and the Vito Genovese family of Cosa Nostra.

This information, your Honor, is borne out by our own [6] intelligence information and the fact that Mr. Miranda is a partner of Mr. Morel in Local Vending.

BY THE COURT:

Q Conte said something about Charles Morel jumping locations?

A No, your Honor. Conte said that Playmore was jumping Morel's locations and he said to Mr. Holzman, "We're not interested in Morel, but the people Morel is with."

Q Who is Playmore?

A According to our investigation the principal of Playmore, which is also an automatic coin machine partnership or corporation, is one Harold Kaufman.

Conte at this time asked Mr. Holzman if Holzman was a partner with Playmore. Mr. Holzman informed Conte that he was not.

At this time Conte said to Mr. Holzman, "We know that you bought out your partner's estate and that you now own Long Island National," which is another juke box operation that Mr. Holzman owns.

He had been a partner in this jukebox operation until his partner, one David Simon, died and he had bought Simon's interest out from the estate.

At this point, according to Mr. Holzman, Conte said [7] to him, "You used Sally's name. He doesn't mind, but people are saying you're Sally Burns' partner."

Mr. Holzman told me that he told Conte, "I never used Sally Burns' name; one of my employees did, and he told me he was authorized to use Sally Burns' name."

At this point Mr. Holzman said Conte said, "No one is authorized to use Sally Burns' name." Conte then said

to Mr. Holzman that Burns wanted to have dinner with Holzman that evening.

Holzman told me that he then said to Conte, "You just come in off the street. You tell me you know Sally Burns. How do I know that you know Sally Burns?"

Holzman then started to walk to the telephone and he told Conte that he would call Sally Burns directly and speak to him on the telephone. At that point Holzman said Conte said, "Don't do that." He, Conte, would have Sally Burns contact Holzman within the next hour.

Mr. Holzman said that approximately two hours passed and he then received a telephone call from Sally Burns at his office at 583 Tenth Avenue, New York. During the course of this conversation Burns invited Mr. Holzman to have dinner with him that evening and Mr. Holzman told me that he advised Burns that he would be unable to meet with him that evening.

[8] They then discussed having lunch the next day, Friday, June 6, 1964. Burns asked Mr. Holzman to meet him for lunch at the Charles Restaurant on Sixth Avenue in Manhattan.

Mr. Holzman told me that he told Burns that he was too busy to meet Burns at the Charles Restaurant, but that Burns could come over to Mr. Holzman's office on Tenth Avenue and have lunch with him.

An appointment was made for the next day. Mr. Holzman said that on June 5, 1964, he was in his office at Tenth Avenue and that Burns did not come to his office for lunch, nor did he call him and inform him that he wasn't coming.

On Monday, June 8, 1964, Holzman told me he left for his Manhattan office at approximately 7:40 A.M. Approximately five minutes after he left for work his wife, Mrs. Ruth Holzman, stated that a man rang her doorbell and said that he was from United Parcel.

At this time she was upstairs in their home at 55 Sycamore Drive in Roslyn. She came downstairs to answer the door.

When she opened the front door the unknown man already had the storm door open and he shoved her backwards and she fell to the floor.

[9] According to Mrs. Holzman she stated that the man put his left hand over her mouth and asked her, "Where is your husband?"

She started to scream and during the struggle the man, who had been wearing glasses lost his glasses. When they fell to the floor she grabbed the glasses and held them under her.

During the course of the struggle the man pulled a gun and when she started to scream a neighbor came to her assistance and three men who had been waiting outside the home informed the man who was inside the home that the neighbors were going to call the police, that the cops were coming, "Let's get out of here."

At this time the man who was in the house left the house and the men got into the automobile and left the scene.

Mr. Holzman said that when he arrived at his office—

Q Excuse me for interrupting you.

A Yes, your Honor.

Q Was this assault reported to the police?

A Yes, it was.

Q And is it under investigation?

A It is under investigation at this time, your Honor.

Q Has the neighbor referred to been interviewed?

[10] A Yes, she has.

Q And does she verify these facts?

A Yes, she does, your Honor. And that matter is under investigation jointly by the Sixth Squad of the Nassau Connty Police Department and the office of the District Attorney of Nassau County.

Mr. Holzman informed me that he arrived at work that morning at approximately ten a.m. Strike that.

Mr. Holzman informed me that when he arrived at his office he was told by a business associate to call home right away.

He called his home and was informed by his son-in-law, Ronnie Billing, what had happened to his wife and he was to come—he was told to come right away.

He drove to his home and after arriving there at approximately 12 p.m., one of his employees, one Lou Drutman, called him and advised him that Sally Burns had

been at this office, Holzman's office in New York, and had said that he'd heard on the radio what had happened to Ruth.

Drutman told Holzman that Burns had left a phone number for Holzman to call Burns at. Drutman gave Holzman the telephone number, 212-LW-4-2523.

The subscriber of this telephone is the Headline Bar, Eight Avenue and 43rd Street, New York City. The exact [11] address of the Headline Bar is 253 West 43 Street, New York County.

At that time from his home Holzman called 212-LW-42523 and asked for Sally Burns. Burns spoke to him on the telephone and instructed Holzman to go to an outside phone and call Burns at 212-LW-4-2523, the same number.

Holzman told me that he went to a neighbor's telephone and again called Burns at the same number. Holzman said that he said to Burns over the telephone, "Did you hear what happened to my wife?"

Holzman said that Burns replied, "I know all about it." At this point Burns asked Holzman to come to New York to meet him at the Charles French Restaurant, 452 Sixth Avenue, Manhattan.

Holzman said that he advised Burns that he didn't want to leave his wife and he wanted to know why Burns wanted to see him.

Holzman said that Burns told him that he wanted to talk to him about what happened to Holzman's wife. Holzman said that he asked Burns to tell him over the telephone and Burns said, "Meet me. Don't talk about it on the telephone."

Holzman said that he and his son-in-law, Ronald Bill-[12] ing went to the Charles French Restaurant, 452 Sixth Avenue in New York and arrived there at approximately three p.m.

Holzman said that Burns asked his son-in-law to wait at the bar while he spoke to Holzman. Holzman said that he and Burns sat at a table at the Charles Restaurant and Burns said to him, "It's around the industry that you're in the million dollar class, you're the biggest man in the industry.

"No one gets in that class unless he has someone with him."

Holzman said that at this time he interrupted Burns and said, "I thought you were going to tell me about what had happened to my wife?"

He said that he asked Burns, "Did you hear about it on the radio?" and that Burns replied, "No, I didn't hear about it on the radio; never mind how I heard about it."

At this point Burns said to Holzman, "If you had met me Friday I wouldn't have forgot to come to you and this wouldn't have happened. If I had come home Sunday from Greenwood Lake instead of Monday this wouldn't have happened.

"The people I'm with are animals. They couldn't wait until I came home."

[13] Holzman said that Burns then stopped talking about his wife and said to Holzman, "Even Costello had to give up a piece.

"Now, with you the family wants $25,000 in cash and I want you to give it to them."

Burns then said to him, "I would never mention the word, 'family' but with you I have no worries and I want 25 per-cent of what you have—not what your partners have—just you."

Burns said to him, at the end of each week he and Burns would meet and have dinner and for every dollar Holzman took in he would keep 75 cents and 25 cents would go to Burns.

He told Holzman, "If at the end of the week you have $1 left I take 25 cents and you keep 75 cents."

At that time Burns asked Holzman for an answer and he told him that he couldn't give him an answer at that time, he'd have to think about it.

Burns then asked Holzman to meet him the next day, Tuesday, June 9, 1964, at the Charles Restaurant.

That evening, Monday, June 8, 1964, myself, District Attorney Cahn and Detective Shephard and Detective Costello were advised of the meeting between Burns and Holzman at the Charles Restaurant.

[14] Holzman also stated that as he was leaving the meeting with Burns that had taken place at the Charles

Restaurant he observed Dino Conte in the bar of the Charles Restaurant. He had no conversation with Conte at that time.

Holzman stated that the meeting to take place on Tuesday, June 9, 1964, at the Charles Restaurant with Salvatore Granello, alias Sally Burns, was set for 12 o'clock noon.

The next day at approximately 12 o'clock noon Holzman in my presence called the Charles Restaurant and spoke to Sally Burns. He asked Burns if he should go out to an outside telephone and call Burns back. Burns said that he wanted Holzman to do that.

Holzman then went to an outside telephone in the presence of myself, Assistant Chief Inspector James Farrell of the Nassau County Police Department, Lt. Frank O'Shea of the Nassau County Police Department, Commanding officer of the Sixth Detective Squad, and Nassau County Detectives Harold Shepherd and Clifford Crawford, both of whom are assigned to the District Attorney's Squad.

At that Holzman placed a telephone call to the telephone number 212-GR 7-3300. The subscriber of that telephone number is the Charles French Restaurant, Inc., located at 452 Sixth Avenue, New York City.

This telephone call was made from the Oaks Pharmacy [15] in Roslyn, County of Nassau, State of New York, and the telephone call was monitored and recorded with the permission of the owner of the Oaks Pharmacy.

Q Holzman knew about it too, I assume?

A And Mr. Holzman. In this conversation Mr. Holzman asked for Sally Burns and Burns got on the telephone.

Mr. Holzman told Burns that someone had been in the phone booth and he had to wait.

Holzman then said to Burns, "On that conversation yesterday, you know, first of all, I don't have any method of raising $25,000 for the family and I think that that should be reduced.

"I think that your request is a little bit out of line."

That he, Holzman, had put in 26 years in this business and that was a big chunk to give away.

Burns said to Mr. Holzman, "Alright, let me say this to you. You know the way I feel about you and I feel worse than you do about what happened, and I want you to know that's an outside faction."

Burns said that he would explain it to Holzman when he saw him. Burns said that it wasn't his people, his friends.

Burns told Holzman that he would explain to Holzman [16] what was involved and what the past history was to this thing.

Burns said to Holzman, "Between you and I as far as a lot of things that have transpired where I was mentioned, et cetera, and so on, to me it's unimportant.

"I'd like, I'd like, I'd love to be with you and I want you to be with me, but I want to start off right.

"If you feel that you want me—Do you want me to be with you?"

And Holzman said to Burns, "Well, I told you yesterday that with you I could get along but as far as these fancy figures for me to go on financing and stuff like that and to have to, you know, the thing is it don't add up, Sal, it just don't add up."

Burns then said, "Well, then I will tell you what you better do, Irv.

"The first thing to do, Irv, the best thing to do if you feel that way about it, 'cause I want to explain, see, I would, I would help you in that situation myself.

"I don't want to come in there for nothing, you understand. I don't want to come in there for nothing, but I must explain to you better than I did yesterday what the, what it involves and how many different—

'There are different elements involved here, you know, [17] that wanted to take a shot at you.

"You understand what I'm talking about?"

Holzman said, "Yes, but that deal yesterday, that is the worst part, you know, I can't understand why you couldn't have stopped that."

And Burns said, "Well, no, no, I will explain you that, too. This was an outside thing where other people wanted to come into the picture.

"Now, the thing is either I have to know that I'm in there or I'm not in there, and I'm not pushing you, take it easy and take care of her. That's more important.

"That is why I suggested for you to have dinner together and I think—"

And Holzman said, "Well, of course—"

And Burns continued and said, "—you'll feel better." Then Holzman said, "I know first of all she's marked up pretty bad and I don't know when she'll be able to walk out of the house."

And Burns said, "Alright."

And Holzman said, "Whoever that was—"

And Burns interuppted him and said, "Alright, I will take care of that in my own way. You'll have satisfaction [18] through my way, you understand, which I don't care to discuss on the phone.

"Let me take care of it and you will be very satisfied. I will take care of it my way because I found out more about the story.

"It wasn't my friends involved here. It was friends, but from other people."

Holzman then said, "Yes."

And Burns said, "If you understand what I'm talking about, and I will take care of that. I'll have the satis— you'll have satisfaction there my way, understand?

"But as far as the deal what I want to do with you, Irv, I think you should come in today."

Holzman told Burns that he couldn't come in, and Burns said, "You can't?"

And Holzman said, "I can't leave her today, If I leave her I ain't going to have a wife, you know."

And Burns said, "No, no, that's more important. If she feels that way you stay home, but I would like you to come down, sit down and you and I, I think we can work the whole thing out. It could worked out."

And Holzman interrupted and said, "Well, listen—"

And Burns continued, "It's bad for you to—I'm sorry— and, uh, if it can't be, it can't be, it's alright.

[19] "Either way, whatever you say. You mean that you want to forget it?"

Holzman said, "Well, I—"

And Burns said, "I wouldn't want you to do that, believe me, as your friend I don't want you to do that."

Holzman said, "Well, Sally, look, first request is way out of line. I just got through buying out an estate and I have means of going out to raise that kind of money in cash.

If I have go to out and borrow it they're not, nobody is going to lend it in cash,"

And Burns said, "Let me say this to you. We'll work that out because I could help you in that situation myself.

"I'll be part and parcel of it with you and when I explain it to you you'll know what I'm talking about, you understand?"

Burns then asked Holzman to again come in and visit him and Holzman said, "You know last night I was a little bit upset with the whole situation, you know, especially after I left you.

"I became upset myself. The thing is getting so that what's the sense of knocking your brains out if these [20] things are going to happen?"

Burns said, "Well, there ain't nothing going to happen. That is what I want to eliminate, and that is the missing link with you, Irving, and you can believe what I'm telling you.

"Then you can do what you want. You can do anything you want. I told you that.

"As far as I'm concerned I think I'm a necessary evil in this situation and the way it will clarify everything all the way around and wencan go forward.

"There'll be no nonsense involved and nothing else, and I'm telling you."

And then Holzman again told him, "I think that the 25 thousand is way out of line."

And Burns said, "The figure can't be changed, but here's what I'm going to do.

"I'm going to do something on my own to work it out."

And Holzman interrupted and said, "Sally, they've got to change the figure. I'm not going to go for $25,000. I told your yesterday.

I know I can deal with you but I'm not going to go for $25,000."

[21] And Burns answered, "Look, you've made your mind up definitely that way, then there is no sense even meeting if you don't want to."

And Holzman said, "I don't say I don't want to meet but I say I'm not going for 25."

And Burns said, "But I want to explain to you, I'll do my best for what I have to do. I know what I have to do, but I can work it out.

"I told you I could work it out."

Burns then said, "Let me sit down with you and we'll discuss it and then maybe I'll go there and say, 'Look, this is what I'm going to do, I'm going, I am doing it on my own, this is for me,' maybe it will be a little different picture, but I can't pick your brain.

"I got to sit down and talk to you, you and I together."

Burns then asked Holzman to again meet him the next day and Burns gave Holzman his home telephone number CA 6-2638, and asked Holzman to call him the next morning at 10 o'clock and let Burns know whether Holzman could meet him at noon at the Charles Restaurant.

Burns said, "You just talked to me in the morning. I'll tell you what to do, call me tomorrow morning at 10 o'clock home," and further told Holzman, "Go outside and [22] call me, and tell me if you're coming in and I'll meet you at 12 o'clock at Charles."

Burns then told Holzman, "If you want to call me, call me tonight," and Holzman asked him:

"Where? At home?"

And Burns told him, yes, he'd be home, but if he wasn't home to call him at this other number, CAnal 6-8509.

Burns told Holzman that, "That's Patrissy's; remember the restaurant downtown, the one on Kenmare Street," and he again gave Holzman the number CAnal 6-8509.

Thereafter, Burns gave Holzman another telephone number.

He said to him, "And the other number I gave you yesterday, I go there once in awhile for a drink, you know."

And Holzman said, "Is that the LW number?"

And Burns said, "LW."

And Holzman told him that he had that number.

Holzman then told Burns, "I'll call you in the morning."

On June 10, 1964, Holzman called Burns at CAnal 6-2638, the code number was 212. CAnal 6-2638 checks to Nancy Granello, 215 Mott Street, Apartment A-1, New York County.

[23] Nancy Granello is known to be the wife of Salvatore Granello, and this is Granello's residence.

The telephone number 212-CA-6-8509 checks to the subscriber Partrissy's Restaurant, 96 Kenmare Street, New York, New York County.

On June 10, 1964, when Holzman called Burns at his home he told Burns that he would call him at 12 o'clock at the Charles Restaurant.

Holzman didn't call Burns at the Charles Restaurant at 12 o'clock on June 10, 1964, and thereafter, during the afternoon of June 10, 1964, Dino Conte called Holzman at his home and told Holzman that Sally was waiting for Holzman's call and told Holzman further, "Well, you should call him and let him know if you want to see him or don't want to see him, 'cause he's waiting."

Conte told Holzman that Sally had left the Charles Restaurant and was now at the LW number. Holzman then called 212-LW-4-2523, the Headline Club, and spoke with Sally Burns.

Burns asked Holzman what happened and Holzman told him, "Do you know Dino just called me. I didn't want to call you.

"I'm upstairs you know. Bill Cahn posted a man here 24 hours. I don't want to call you from home with a guy sitting in."

[24] Burns told Holzman, "Why don't you take a ride out? Two minutes. You know I waited for your call."

Holzman told Burns, "Well, the man goes with me, that's what Cahn told him to do."

And Burns answered, "Irving, look, I know you're home. It's allright. Do you want to see me or you don't want to see me."

Holzman said, "Well, I'm not coming into New York for a couple of days and I'm staying here."

Burns then said, "I would like to see you on this one way or the other. I know what you want me to do and I'll

know what you want me to do, and I'll get away from the picture altogether."

And Holzman told Burns that he'd see him when he came into New York and as soon as he came into New York.

Holzman told Burns that he would be in New York on Monday. Burns told Holzman, "I understand, but at the same token you know when I tell you, Iving, I waited for you, I don't go no place, I wait for you." Holzman told Burns he was sorry.

Buns said to Holzman, "It's important to me, too, you know what I mean."

Holzman said, "I was doing this for you, not for me." And Burns said, "Okay, buddy. Look, try to get in touch [25] with me Friday morning."

Holzman said, "If not, you will hear from me."

And Burns said, "I go up to the country."

And Holzman said, "If you go up to the country you will hear from me Monday before 12 o'clock."

And Burns said, "In fact, I'll tell you the truth, what I would like you do Saturday or Sunday, put Ruth in a car and come up to the house and stay the whole day with me and she'll be a new woman; that's what I would like youto do."

And Holzman said, "Well, where is this place?"

Burns said, "It's in Greenwood Lake."

Holzman said, "Greenwood Lake is a big place."

Burns said, "Well, I could give you the whole instructions. You come right over the mountain and in fact, Dino will come with you and show you the place."

Holzman said to Burns, "Let me put it this way. If I can convince her to go up I will call you Friday morning at the house."

Burns said to Holzman, "Well, you do that, call me and give her my love."

Holzman said to him, "And don't forget I didn't call because—" And Burns interrupted him and said, "Allright, but I wanted to hear from you, Irving.

"You know how I am when I do something, I do it right."

[26] Holzman said, "But you know where I am, too."

And Burns said, "Allright, I don't care. I don't care who's there, and who's not there. With me I'm one way.

"If I have to do something for you I'll do it, and if we don't want to do it, forget about it.

"So you call me Friday morning. If you come in early call me."

And that was the end of the conversation.

On Monday, June 15, 1964, Holzman met with Burns at his New York office at 583 Tenth Avenue, New York. The meeting was set up after a telephone call from Holzman to Burns at Burns' home, CAnal 6-2638.

During the course of the meeting at Holzman's office Burns gave Holzman his Greenwood Lake telephone number, Code number 914, GR 7-2439. The telephone number 914, GR 7-2439 checked to the subscriber Nancy Granello, Lakelands, Greenwood Lake.

Nancy Granello is the wife of Salvatore Granello, alias Sally Burns.

On Tuesday, June 23, 1964, Holzman again met with Salvatore Granello-Sally Burns at his New York office. At that time Burns asked Holzman for $12,500 for the family, and he told Holzman that Holzman should make a [27] $5,000 down payment by that coming Friday.

He told Holzman, "You can't keep stalling." And he advised Holzman, "if you don't want to make a deal with them I'll bow out."

Holzman told Granello that he would let him know by Friday or the latest Monday.

On Friday, June 26, Dino Conte called Drutman, an employee of Holzman's at Holzman's office in New York and told Drutman that Irving made an appointment and didn't keep it and that is now way to act.

On Monday, June 29, Holzman called Granello and told Granello that he wasn't going to give any money to the family and he wasn't going to give Granello any part of his business.

Granello told Holzman, "Okay, buddy, I'm bowing out. Now you're on your own."

On Tuesday, June 30, Delores Billing who is the married daughter of Irving Holzman received a telephone call

at her home. Her telephone number is OV-1-0271. The call was received at approximately 10:20 a.m.

The caller said to Delores Billing, "Delores, if your father doesn't cooperate we'll come to Sylvia Lane and kick your fucking pregnant belly in."

Holzman's daughter resides with her husband, Ronald [28] Billing at 65 Sylvia Lane, Plainview and she is presently pregnant.

During the course of this investigation I spoke with Joseph Albino who is a business associate of Irving Holzman. Both Holzman and Albino told me that they knew Salvatore Barbella also known as Rocco Barbella, also know as Rocky Graziano.

Albino said that he entered Mercy Hospital on Thursday, June 18, 1964, for an operation. He said that on Tuesday, June 23, 1964, he received a telephone call at Mercy Hospital in Rockville Centre, Nassau County, New York, from Rocky Graziano.

Graziano said to him, "I met a guy on the street in New York who walked up to me and said, 'Your cousin is in the hospital.' "

Graziano asked Albino if he could come to see him in the hospital. And he also said to Albino, "I understand your partner, Irv, and you are having a little trouble.

"I can't talk to you on the phone. Can you read between the lines? Can I come up to see you?"

Albino told Graziano that he could come to see him at Mercy Hospital.

Graziano, according to Albino, didn't come to see him in [29] the hospital, but on Sunday, June 28, Graziano during the morning stopped at Albino's home in West Hempstead.

Albino told me that Graziano said to him that he Graziano was sitting at a table with guys the other day and these guys were talking rough. "They said they were going to hurt your partner, Irv, and you."

Graziano said to Albino, "I told them you were my cousin and that they shouldn't hurt you." Graziano then asked Albino, "What did you do to aggravate them? You must have done something."

Albino told Graziano at that time that he nothing to do with Holzman's business in New York; that he was

only his partner in Nassau County and in other parts of Long Island.

Graziano then asked him, "What did Irving do to them?" At that point Albino told me that he told Graziano that Sally Burns wanted $25,000 in cash from Holzman for the family and 25 per-cent of his business.

At that point Albino said Graziano said to him, "Don't take sides. If you're asked you stay neutral. Don't worry. You're not going to get hurt."

At the end of the conversation Graziano said to Albino, "The guys want to know an answer. Tell him the guys are waiting for an answer."

[30] In regard to Robert Luttman and in addition to the testimony that I've previously given with regard to Luttman I wish to state that Holzman told me that approximately seven months ago he was engaged in a conversation with Luttman about women; and during the course of this conversation Luttman indicated to Holzman that he was being kept by a woman who gave him thousand-dollar bills as spending money.

Holzman said to me that during the course of this conversation with Luttman he made up a story which he told Luttman that he, Holzman, was keeping company with a Copacabana chorus girl named Joyce.

Holzman told me that he didn't know any Copacabana chorus girls, let alone one named Joyce, and that he wasn't keeping company with any woman.

He said that he made this story up during the course of his conversation with Luttman. Holzman further stated that at the time of his meeting with Salvatore Granello alias Sally Burns on June 15, 1964 at his business in New York City Burns said to him, "I did you a favor. I know a shylock who works at the Copacabana and I told him to tell Joyce to forget you because you're a married man."

Holzman stated to me that this information couldn't have been given to Burns by anyone other than Luttman because Luttman was the only one present when he made this statement.

[31] On June 30, -964, Detective Fred Pawel and Detective Thomas Costello of the Nassau County Police Department assigned to the District Attorney's office, were in Patrissy's Restaurant.

On that occasion they observed Salvatore Granello alias Sally Burns in the bar of that restaurant. During the course of this surveillance of Salvatore Granello alias Sally Burns, Burns used two public telephones.

The telephone numbers of these two public telephones are CA 6-8509 and CA-6-8854. The telephone number CAnal 6-8854 is listed to Patrissy's Restaurant, 98 Kenmare Street, New York County, New York.

I wish to correct for the record, your Honor, I had earlier said that Salvatore Granello alias Sally Burns was presently under indictment charged with rape as a felony. On July 19, 1963, that indictment was dismissed and I was in error when I told you that the indictment was pending.

On July 17, 1940, Granello was arrested by the State Police, Trenton, New Jersey, and charged as a disorderly person and received a sentence of ten days.

On October 6, 1940, he was arrested in Manhattan for assault and robbery and the final disposition of that case [32] was a conviction for assault in the third degree.

On January 29, 1949 he was arrested in New York City and charged with violation of the Selective Service Laws and prosecution was denied by the federal authorities thereafter.

On July 25, 1947, he was arrested in Manhattan and charged with Grand Larceny. That charge was discharged in Manhattan Felony Court.

On January 14, 1959 he was arrested in Brooklyn and charged with 887 of the Code of Criminal Procedure, subdivision 1, vagrancy, and that charge was dismissed.

He is presently under indictment as I've previously testified and charged with income tax evasion.

On this indictment his co-defendant is one George Levine. George Levine is the stepfather of Rocky Graziano. Joseph Albino informed me that Graziano is the Godfather of Granello's youngest child, a daughter.

MR. LEVY: Your Honor, on the affidavit of Norman J. Levy, Assistant District Attorney, and the sworn testimony of Norman J. Levy before your Honor, the People make application to intercept and record all telephone communications over a telephone instrument bearing tele-

[33] phone number 212-LW-4-2523. This telephone instrument is located at 252 West 43 Street, New York County, New York.

The subscriber of that telephone is the Headline Bar which is located at 252 West 43 Street, New York County, New York.

The basis of the People's application, your Honor, is the affidavit by Norman J. Levy that is before you and the sworn testimony of Norman J. Levy which you have heard.

THE COURT: Mr. Levy, have you been trying to verify whether the daughter of Holzman was in fact threatened?

MR. LEVY: Your Honor, Detective John Skuzenski of the Nassau County Police Department assigned to the District Attorney's Squad interviewed Mrs. Delores Billing at her home on Sylvia Lane yesterday and the facts that I testified to before your Honor were stated to Detective Skuzenski by Mrs. Billing.

The District Attorney's office and the Nassau County Police Department are working on an investigation to identify the caller.

THE COURT: At the present time have you been able to get any clue which would lead you definitely to the [34] caller?

MR. LEVY: We have not, your Honor.

THE COURT: You feel as though this tap will assist you in that quest?

MR. LEVY: Yes, your Honor.

THE COURT: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

MR. LEVY: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holzman, in regard to the demand for $25,000 and 25 per-cent of his business.

THE COURT: So that in addition to the alleged extortion you are faced here with the threats of violence and physical harm to innocent people?

MR. LEVY: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billing.

THE COURT: I am satisfied that there is reasonable ground for granting your application.

COUNTY CLERK'S OFFICE,)
STATE OF NEW YORK,) SS:
COUNTY OF NASSAU)

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Court of Record, do hereby certify that I have compared the annexed with the original minutes of Ex Parte Hearing filed in my office May 24, 1968 and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
Norman J. Levy [*], an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

212 LW 4-2523

Upon the annexed petition of *Norman J. Levy* and the sworn testimony of *Norman J. Levy* there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing telephone number *212 LW 4-2523* located at *255 West 43rd Street*, New York County, New York, it is

ORDERED that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello*, *Dino Conte* and any and all other persons communcating by both incoming and outgoing calls over the telephone located at *255 West 43rd Street, New York County*, New York, now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated, and it is further

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(* This is a form order and the filled in blanks are here designated by italic.)

ORDERED, that the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, or their duly authorized agent, or agents, be, and they hereby are, authorized and empowered to cut, break, tap, and make connection, with any and all wires leading to and from said telephone instrument that the said District Attorney of Nassau County or said *Norman J. Levy*, or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire and to do all things necessary to permit the communications being transmitted over said telephone instrument to be intercepted under and pursuant to the provisions of this order; and it is further

ORDERED, that this order shall be effective and in force until *the 29 day of August, 1964.*

Dated: Mineola, New York
[June 30,] 1964
July 1

/s/ Harold M. Spitzer
County Judge of Nassau County

COUNTY CLERK'S OFFICE,)
STATE OF NEW YORK,) SS:
COUNTY OF NASSAU)

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts of Record, do hereby certify that I have compared the annexed with the original Order for Interception filed in my office Dec. 14, 1965, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
Norman J. Levy [*], an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

212 CA 6-8509—CA 6-8854

Upon the annexed petition of *Norman J. Levy* and the sworn testimony of *Norman J. Levy* there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instruments bearing telephone numbers *212 CA 6-8509 and CA 6-8854* located at *98 Kenmare Street, New York* County, New York, it is

ORDERED that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over the telephones located at *98 Kenmare Street, New York County,* New York, now designated as *212 CA 6-8509 and CA 6-8854* and by whatsoever number the said telephones and telephone lines may be hereafter designated, and it is further

(* This is a form order and the filled in blanks are here designated by italic.)

ORDERED, that the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, or their duly authorized agent, or agents, be, and they hereby are, authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instruments that the said District Attorney of Nassau County or said *Norman J. Levy*, or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wires and to do all things necessary to permit the communications being transmitted over said telephone instruments to be intercepted under and pursuant to the provisions of this order; and it is further

ORDERED, that this order shall be effective and in force until *the 29th day of August, 1964.*

Dated: Mineola, New York, July 1, 1964.

/s/ Harold M. Spitzer
County Judge of Nassau County

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

THOMAS R. KAISER, DEFENDANT

SIR:

PLEASE TAKE NOTICE that upon the Indictment herein and upon the annexed affidavit of MICHAEL J. CAPANEGRO, sworn to the 24th day of August, 1964, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Nassau at the County Courthouse at Old County Road, Mineola, New York, on the 2nd day of September, 1964, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an Order granting the above named defendant leave to inspect the Grand Jury Minutes of the testimony upon which the Indictment herein was based, and upon such inspection, for an Order dismissing the Indictment heretofore returned against the said defendant on the 16th day of July, 1964, charging him with the crimes of conspiracy, in violation of Section 580-a of the Penal Law of the State of New York; attempted extortion, in violation of Section 850 and 951 of the Penal Law of the State of New York, coercion, in violation of Section 530 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; and for the crime of burglary in the second degree, in violation of Section 403 of the Penal Law of the State of New York, upon the ground that the evidence adduced before the Grand Jury upon which said Indictments were based was insufficient in law to warrant the findings there and that such inspection of the Grand Jury

Minutes is necessary therefor, and, for such other and further relief as the Court may deem just and proper.

Dated: Flushing, New York, August 21, 1964.

Yours, etc.,

MICHAEL J. CAPANEGRO
Attorney for Defendant
THOMAS R. KAISER
Office & P.O. Address
136-51 37th Avenue
Flushing, New York

TO:

WILLIAM CAHN
District Attorney
County Court House
Mineola, New York

* * * *

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

THOMAS R. KAISER, DEFENDANT

STATE OF NEW YORK)
)
COUNTY OF QUEENS)

MICHAEL J. CAPANEGRO, being duly sworn, deposes and says that:

He is the attorney for the defendant THOMAS R. KAISER, above named, hereinafter referred to as Defendant.

Said defendant was indicted on the 16th day of July, 1964, by the Grand Jury of Nassau County for the crimes of conspiracy, in violation of Section 580-a of the Penal Law of the State of New York; attempted extortion, in violation of Section 850 and 851 of the Penal Law of the

State of New York; coercion, in violation of Section 530 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; and for the crime of burglary in the second degree, in violation of Section 403 of the Penal Law of the State of New York. A copy of such Indictment is annexed hereto and made a part hereof, marked Exhibit "A".

The defendant pleaded not guilty to the said Indictment on the 16th day of July, 1964, and was admitted to bail in the amount of $25,000.00, and is presently free on such bail.

This motion is twofold and seeks an order granting the defendant an inspection of the Minutes of the Grand Jury Hearing, and upon such inspection, a consideration of the dismissal of the Grand Jury Indictment.

Your deponent has made a reasonable effort to ascertain what has been testified to before the Grand Jury, and what was learned.

On the 20th day of August, 1964, a certified letter was sent to the District Attorney of Nassau County, William Cahn, requesting names and addresses of witnesses who testified before the Grand Jury, and for an inspection of the Grand Jury Minutes. Said request was denied. Deponent has neither the knowledge nor the means of securing such knowledge to ascertain the testimony and names and addresses of the witnesses.

On information and belief, defendant is not guilty of any of the charges in the Indictment on the ground that the evidence received by the Grand Jury was insufficient to support the said Indictment and, on information and belief, there is an absolute failure of proof of any of the essential elements of the crimes under each Count of the Indictment. Deponent will take each Count of the Indictment separately, as follows:

* * * *

On information and belief, the evidence which was submitted to the Grand Jury was illegal and improper, and none but legal evidence should have been submitted. Telephonic interceptions, being illegal, should not have

been presented to the Grand Jury as it was obtained as a result of unreasonable search and seizure, without the permission of the person affected. On information and belief, if any telephonic interceptions which were made, were not made pursuant to Section 813a of the Code of Criminal Procedure, and if such telephonic communications were made pursuant to an order to wire tap, then such interception and Section 813a are in violation of the Fourth Amendment. Telephonic interceptions or any wire tap evidence which were submitted to the Grand Jury, did not have any corroboration of identifying witnesses who could identify the voice of the defendant, Thomas Kaiser, with that on the alleged telephonic interception.

On information and belief, such inspection of the Grand Jury Minutes would not work to the prejudice of the People nor serve to defeat the ends of justice.

No previous application has been made to this Court or any other court for the relief sought herein.

WHEREFORE, your deponent respectfully prays that this Court grant an Order permitting the defendant and this Court to inspect the Minutes of the Grand Jury, and upon such inspection, further grant an Order setting aside the Indictment against this defendant, bearing Index Number 20,122 of 1964, handed down on July 16, 1964, as to each and every Count of the Indictment as regards the defendant, THOMAS R. KAISER, or any part of the said Indictment, and for such other and further relief as this Court may deem just and proper.

/s/ Michael P. Capanegro

Sworn to before me this
24th day of August, 1964.

DONALD WARREN
Notary Public, State of New York
No. 41-9538050 Queens County
Certificate Filed in New York County
Term Expires March 30, 1966

* * * *

C-371

MEMORANDUM

COUNTY COURT : NASSAU COUNTY

BY HON. JAMES L. DOWSEY, JR. County Judge
DATED December 15, 1964

Indictment # 20,122

THE PEOPLE OF THE STATE OF NEW YORK

vs.

THOMAS R. KAISER, DEFENDANT

HON. WILLIAM CAHN
District Attorney of Nassau County
Mineola, New York

MICHAEL J. CAPANEGRO
Attorney for Defendant
136-51 - 37th Avenue, Flushing 54, New York

Motion to inspect the Grand Jury minutes or in the alternative to dismiss indictment herein is denied. This Court, after reading the Grand Jury minutes, is satisfied that the evidence submitted is sufficient to sustain the indictment. Submit order.

JAMES L. DOWSEY, JR.
County Judge

COUNTY CLERK'S OFFICE,)
STATE OF NEW YORK,) SS:
COUNTY OF NASSAU)

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original MEMORANDUM FILED in my office Dec. 14, 1965 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

COUNTY COURT : COUNTY OF NASSAU

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of IRWIN L. GERMAISE, ESQ., sworn to the 25th day of October, 1965, and upon the Petition of Norman J. Levy, Esq., Assistant District Attorney of the County of Nassau, which Petition was signed the 30th day of June, 1964, and upon the Order of Interception, signed on July 1, 1964 by Hon. Harold Spitzer, former Judge of the County Court of the County of Nassau, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at Special Term, Part I thereof in the County Courthouse, Old Country Road, Mineola, County of Nassau, on the 10th day of November, 1965 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order declaring unreasonable, illegal and void the interception of telephonic communications which was carried out pursuant to an Order of Hon. Harold Spitzer, former County Judge of Nassau County, which Order was signed on July 1, 1964, and for an Order precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the course of, or as a result of, the said unreasonable, illegal and void interception.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 813-C of the Code of Criminal Procedure, coun-

sel will move for a Hearing herein upon the foregoing matters, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 25, 1965

Yours, etc.

/s/ Irwin L. Germaise
IRWIN L. GERMAISE
Attorney for Defendant
Thomas R. Kaiser
Office and Post Office Address
31 Broadway
New York 7, New York
Telephone: WOrth 4-5180

TO: HON. WILLIAM CAHN
District Attorney
County of Nassau
County Court
County Courthouse
Old Country Road
Mineola, New York

WARREN DOOLITTLE, ESQ.
Assistant District Attorney
County of Nassau
Of Counsel

* * * *

COUNTY COURT : COUNTY OF NASSAU

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

IRWIN L. GERMAISE, being duly sworn, deposes and says:

That he is the attorney for defendant Thomas R. Kaiser in the within action and makes this Affidavit in support of the relief requested herein.

That it is settled law in the State of New York that "wire tapping" may be permitted only upon a showing of "probable cause" that crime has been or is being committed. *Section 813-A, Code of Criminal* Procedure.

That the standards for the issuance for a "wire tap" order are none less than those for an issuance of a search warrant. "Probable cause" for issuance of a search warrant exists where there is reasonable ground for suspicion which is supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated. The Petition of Norman J. Levy, Assistant District Attorney of the County of Nassau, upon which the Order permitting the interception which is the subject of this Motion was based, does not have any supporting facts or circumstances with respect to the reasonable ground or "probable cause" for the Order to have been entered. (Copies of the Petition and Order are annexed hereto and made a part hereof.)

This is an insurmountable element which must be present for the Order to be signed. Under the Fourth and Fourteenth Amendments to the Constitution of the United States, a search warrant (similar to an Order for interception), may not be issued unless sufficient evidence is presented to the signing member of the Judiciary for a determination by him that "probable cause" exists. It is insufficient in law to grant an Order for the interception of telephone communications where the applying official merely states that "he has received reliable information from a credible person and he believes that a crime is being committed or information concerning crimes will be ascertained by the interception of certain telephonic conversations". Evidence obtained as a result of an interception based upon an Order issued upon such an Affidavit is inadmissible and a conviction based upon such evidence must be reversed. *Aguilar* v. *The State of Texas, New York Law Journal, June 23, 1964.*

In a motion for suppression of evidence obtained under a search warrant, it was held, that where the affidavit supporting the search warrant does not allege facts which arise above mere suspicion that the crime was being commited on the premises, the Court reviewing the propriety of the warrant, may vacate it, since the affidavit upon which the search warrant was predicated did not show reasonable ground for belief of guilt of the offense. A defendant, under such circumstances is entitled to have the evidence returned to him. *C.C.P. Sec. 783; People* v. *Coscia, 42 Misc. 2nd 978, 250 N.Y.S. 2nd 308.*

The Court of Appeals of the State of New York, held that, "Where defendants were convicted of bookmaking, an affidavit alleging that police officers observed several allegedly known bookkeepers to enter on various occasions a private dwelling wherein there were located two unlisted phones, did not disclose a 'probable cause' for the issuance of a search warrant on the ground that the dwelling was being used for bookmaking and the conviction was reversed." *People* v. *Fino, 14 N.Y. 2nd 160, 250 N.Y.S. 2nd 47.*

That it is clear from a reading of the Petition of Norman J. Levy, which Petition sought the Order of Inter-

ception pursuant to which "wire tap" activities ensued, which activity is moved against herein, that nothing beyond suspicion was set forth for the consideration of the signing Judge, and this is insufficient to sustain the Order and to permit the use of that which was obtained or learned as a result of the activity based upon this improperly signed Order. It is well settled that evidence subsequently obtained as a result of an improperly granted Order cannot retroactively serve in and of itself as the "probable cause" for the granting of the Order.

That it is noted that the Order of Interception herein, is a mimeographed form and has printed thereon the following: "Upon the annexed Petition of (typewritten name of 'Norman J. Levy' typed in here) and the sworn testimony of (typewritten name of 'Norman J. Levy' typed in here) there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instrument . . . ."

Your deponent respectfully requests a Hearing herein pursuant to *Section 813-C of the Code of Criminal Procedure* so as to ascertain whether or not there actually was "sworn testimony of Norman J. Levy," or merely the mimeographed form stated so, for if there was not, the Petition is patently insufficient to support an Order for the interception of telephonic communications. On the other hand, if such "sworn testimony of Norman J. Levy" was given to support the granting of the subject Order, the content and quality of such testimony is subject to examination so as to ascertain whether or not the said testimony was sufficient to show "probable cause" for the granting of the Order.

That in the absence of a Hearing as requested hereinabove and in the absence of a disclosure of whether or not there was "sworn testimony of Norman J. Levy", and if so, whether such "sworn testimony" was sufficient to sustain the granting of the Order herein, the patent lack of factual allegations make the mere Petition seeking the Order of Interception insufficient to establish the "probable cause" necessary for the granting of the Order, and as such this Motion to suppress should be granted. This

is claimed upon the authority of *People* v. *Cohen*, *42 Misc. 2nd 403*, *248 N.Y.S. 2nd 339*.

WHEREFORE, your deponent respectfully requests that an Order be granted herein, declaring unreasonable, illegal and void the interception of telephonic communications which were carried out pursuant to an Order therefor signed by Hon. Harold Spitzer, former County Judge of Nassau County and signed on July 1, 1964 and for the suppression of any matter obtained as a result of such Order, and it is respectfully requested that a Hearing be ordered herein with respect to the foregoing, and for such other and further relief as to the Court may seem just and proper.

/s/ Irwin L. Germaise
IRWIN L. GERMAISE

Sworn to before me this
25th day of October, 1965

/s/ Loretta Schobe
LORETTA SCHOBE

Notary Public, State of New York
No. 24-3528560
Qualified in Kings County
Commission Expires March 30, 1967

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

v.

SALVATORE GRANELLO, Also Known as SALLY BURNS, DINO CONTE, DINO HARRIS, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

* * * *

Irwin L. Germaise for Thomas R. Kaiser, defendant.
William Cahn, District Attorney, for plaintiff.

JAMES L. DOWSEY, J. Defendant, Thomas R. Kaiser, moves for an order declaring unreasonable, illegal and void the interception of telephone communications pursuant to an order signed on July 1, 1964 by the HON. HAROLD SPITZER, former County Judge of Nassau County; and further, for an order precluding the use of evidence upon the trial of the indictment, the results of the telephonic communications.

The order signed on July 1, 1964 was done in compliance with section 813-a of the Code of Criminal Procedure of the State of New York, which provides, in part, that "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal llaw may be issued by any * * * judge of a county court * * * upon oath or affirmation of a district attorney * * * or of an officer above the rank of sergeant of any police department of the state or any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order, the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application."

The defendant seeks a hearing to determine whether the information submitted to the court was legally sufficient to support the ex parte order.

The defendant, in requesting a hearing is attempting to convince this court that a close analogy exists between the ex parte order authorizing the interception of a telephone communication pursuant to section 813-a of the Code of Criminal Procedure, and the issuance of an order for a search warrant, pursuant to section 793 of the Code of Criminal Procedure. A search warrant is issued upon facts and circumstances which permit the signing Judge to conclude that "probable cause" exists. A wiretap order, as explained herein, is issued upon "reasonable ground to believe that evidence of crime may be thus obtained". In the case of a wiretap, the Judge issuing the order has the authority by the statute to examine on oath the applicant and the witnesses he may produce, and he invariably does so to satisfy himself of the existence of reasonable grounds for the granting of the ex parte wiretap order, and in doing so, a consensus has developed, that sound discretion can only be exercised if the criteria of proof required to establish "reasonable ground" in the issuance of an ex parte wiretap is tantamount to the stringent requirement of probable cause that exists in the issuance of an order for a search warrant. The analogy ends right there, however. Section 807 of the Code of Criminal Procedure provides for contravention of a search warrant to test the grounds of probable cause upon which it was issued; there exists no analogous provision in the Code of Criminal Procedure to contravene the issuance of an ex parte wiretap order; an inherent right does not exist in one whose telephone is tapped pursuant to section 813-a to determine by a hearing whether or not the judicial discretion of the Judge, which issued the order, was properly exercised.

It has been the policy of this court in the absence of legislative fiat in permitting a hearing concerning issuance of wiretap orders, similar to the type of hearing held to test the issuance of search warrants pursuant to section 807 of the Code of Criminal Procedure, to presume that the Judge, who issued the order, exercised sound dis-

cretion and that the ex parte wiretap order was issued upon the sufficient proof required.

It is conceded, however, that in the context of special circumstances, a court, in the absence of specific statutory authority, has the inherent power to review wiretap orders where the interest of justice mandates; no such compelling reason has been set forth by the defendant in the instant case.

CPLR 4506 provides that evidence obtained by means of eavesdropping without a court order shall be inadmissible in criminal proceedings.

This exclusionary rule does not apply to authorized wiretaps by court order issued under section 813-a of the Code of Criminal Procedure.

Section 813-a does not violate any provision of the Federal Constitution. The United States Supreme Court has held in *Olmstead* v. *United States* (277 U.S. 438) that telephone wiretapping does not violate the Fourth or the Fifth Amendment.

Section 605 of title 47 of the United States Code (Federal Communications Act of 1934) prohibits "interception" and "divulgence" and such wiretap evidence is therefore inadmissible in Federal courts. In *Nardone* v. *United States* (308 U.S. 338) the court stated that evidence obtained by wiretap shall not be used at all. Does the Federal exclusionary rule apply to State criminal prosecutions? The Supreme Court in *Schwartz* v. *Texas* (344 U. S. 199) stated it did not. Later in *Benanti* v. *United States* (355 U. S. 96) the court intimated that Congress would frown upon State legislation that was inconsistent with section 605; any contradiction would violate the public policy implicit in the Federal prohibition.

In *Pugach* v. *Dollinger* (277 F. 2d 739, affd. without opn. 365 U. S. 458) the court stated that a police officer who taps a telephone, even though authorized by a State court order, when he divulges same, a Federal crime is committed. An attitude is developing in State courts against "use" or "divulgence" of wiretap evidence based on this rationale. See *Matter of Interception of Tel. Communications* (9 Misc 2d 121) decided January 2, 1958, stating that all wiretaps, whether authorized by section 813-a of the Code of Criminal Procedure or not, are illegal.

In spite of this history concerning wiretap evidence, the policy of this court is guided by the perspective evolving from the 1938 Constitutional Convention prohibiting wiretapping without court order (art. I, § 12); in 1942 the ban was implemented by the enactment of section 813-a of the Code of Criminal Procedure authorizing use by court order; and an exclusionary rule, by CPLR 4506, of unauthorized wiretaps. It is to be noted from this history that no statutory provision exists for a pretrial motion to suppress, of the type presently before this court.

In *People* v. *Cohen* (41 Misc 2d 158) a hearing was demanded and rejected; the defendant's appeal was dismissed by the Appellate Division (N. Y. L. J., April 18, 1963, p. 16, col. 5) and leave to appeal to the Court of Appeals was denied both by FULD, J., on July 10, 1963 and by the court *en banc* (13 N Y 2d 595); see *People* v. *Scardaccione* (41 Misc 2d 433).

On February 25, 1964 in *People* v. *Cohen* (42 Misc 2d 403) it was held on a reconsideration of the motion to suppress, that the prior denial was solely on procedural grounds, and that the court had the inherent power of vacating a wiretap order if perjury or error be shown in the original suporting affidavits or for any other cogent reason; the court employed section 813-c of the Code of Criminal Procedure to suppress wiretap evidence based on the interpretation that it was the legislative intent of State compliance with Federal constitutional search and seizure requirements pursuant to the mandate of *Mapp* v. *Ohio* (367 U. S. 643).

This court disagrees with such pragmatic elasticity of interpretation of section 813-c; if this type of subjectivity were to prevail by all Judges of courts of original jurisdiction, chaos would reign in the administration of justice; uniformity and consistency can prevail only if courts of original jurisdiction refrain from usurping the appellate and legislative functions.

In an appeal from the order dated March 13, 1964 involving *People* v. *Cohen* the Appellate Division (24 A D 2d 900) found that although sufficient consent was not forthcoming to support the search without a warrant and not incidental to a lawful arrest, that the affidavits sup-

porting the wiretap order were sufficient. Then, by way of dicta, the court intimated that the wiretap order was the proper subject of judicial review by utilizing the same procedural mechanics utilized with respect to warrants for search and seizure.

If the implications of this decision are to be followed by this court without becoming mired in a quandary, the Legislature, without delay, should define by statutory procedure the mechanics to be followed in conducting such judicial review, and more importantly, to provide a uniform standard at to what constitutes "reasonable ground to believe evidence of a crime may be thus obtained"; this will produce a record of the facts subject to later judicial review; require filing with the issuing Judge the results of each order in the form of a return; and last but certainly not least, provide for filing of the order and return with the Clerk of the court with provision that same be made available to defense counsel, to enable him to controvert the factual basis upon which the order was issued; only then will a semblance of due process arise from the chaos and uncertainty that now exists.

The Court of Appeals in *People* v. *Dinan* (11 N Y 2d 350) has reaffirmed the policy adopted in *People* v. *Variano* (5 N Y 2d 391); *People* v. *Dinan* (7 A D 2d 119, affd. 6 N Y 2d 715) based on the power reserved to the States, as enumerated in *Schwartz* v. *Texas (supra)*, that wiretaps do not infringe constitutional immunities against unreasonable searches and seizures (*Olmstead* v. *United States, supra*). The court further stated that although *Benanti, Nardone* and *Schwartz* held the means of obtaining such evidence illegal, the State forum should decide as a policy measure whether the exclusionary rule of section 605 of the Federal Communications Act should be implemented. The highest court of this State, as a matter of policy, has chosen not to exclude such testimony. This court is, therefore, bound to adhere to the policy promulgated in *People* v. *Dinan (supra)*.

This court, although denying a pretrial motion to suppress wiretap evidence, does not preclude a possible exploration of the underlying basis of reasonable grounds that existed at the time the ex parte wiretap order was issued, in the course of the trial as a condition precedent

to establishment of the proper foundation to introduce the wiretap evidence under normal rules of evidence; this court is of the opinion that due process requires such an examination.

Only the future legislative or appellate process can determine and redefine whether the protection of the Fourth Amendment can be interpreted to encompass the proprietary interest of a person's words or phrases in the context of discourse in a phone conversation and for the purposes of uniformity, promulgate the procedural mechanics of testing pretrial the basis upon which ex parte wiretap orders were signed. Until such an eventuality, the court is limited to implementation of the law as it currently is interpreted, without entering the domain of the appellate process in search of novel contemporary legal truths. It is therefore ordered that the application is denied.

Entered, Dec. 13, 1965,

Franklin H. Ornstein, County Clerk of Nassau County.

/s/ James L. Dowsey
C.J.

Dated December 13th, 1965

COUNTY CLERK'S OFFICE,)
STATE OF NEW YORK,) ss:
COUNTY OF NASSAU)

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original ORDER FILED & ENTERED in my office Dec. 13, 1965 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

COUNTY COURT: NASSAU COUNTY

PART II

Ind. # 20122

THE PEOPLE OF THE STATE OF NEW YORK

- against -

THOMAS R. KAISER, DEFENDENT

Mineola, New York
May 31, 1966

BEFORE:

HON. ALBERT A. OPPIDO, County Court Judge, and a jury.

APPEARANCES:

WARREN M. DOOLITTLE, ESQ., Assistant District Attorney for the People.

F. COURTS BOUSE, ESQ., for the defendant.

M. WOWK
HAROLD F. X. MCGRATH
Official Court Reporters.

[the Following Occurred in the Absence of the Jury Panel]

* * * *

[15] MR. BOUSE: Well, can the defendant make this further motion: that under the McCall case he be allowed a hearing on any wiretaps that the district attorney intends to introduce into evidence.

THE COURT: Well, yes, but that is going to be—I understand—I don't know, I don't know whether or not there are any to be presented. Are there?

MR. DOOLITTLE: I'll make a statement, your Honor, relative to that. Yes, I would say the core of our case in the proof of this conspiracy and of the particular acts

involved in the conspiracy will be as a result of taped recordings. Now, these taped recordings came about by three sources, really. One was a bug in an office, in the [16] office of Irving Holzman who is the intended victim of the attempted extortion and a conspiracy, so I don't think there is any question that anybody is entitled to any hearing on that bug.

There are taped recordings of telephone conversations which were made of Mr. Irving Holzman—again the intended victim. He gave consent to the law enforcement authorities to monitor his telephone conversations which were had with Granello, I think it is Granello, one of the co-conspirators. On those particular conversations, with the process of it being a monitored phone conversation, I don't think there is any authority whatsoever for the defendant to have any McCall hearing on that. As to other conversations, there are conversations I believe involving Conte and Kaiser. These are taped recordings of wiretaped conversations pursuant to a court order of this court which were made on the Headline Club which is a club in New York City. Now, these taps were put on pursuant to a court order. Thomas Kaiser is not a subscriber to the telephone which was tapped, he is not an officer of the Headline Club, he has no interest whatso-[17] ever. The conversation in which his testimony or his telephone conversations will be presented are actually conversations that he made from an outside phone in to this Headline Club or which were made from the Headline Club to him.

We also have another telephone tap on a Patrissy's Restaurant which this defendant is not a subscriber to their telephone, he is not a privy in any way whatsoever to the corporation that owns Patrissy's Restaurant. He has no interest whatsoever and he himself is not on that particular phone call.

THE COURT: Well, you see, Mr. Doolittle, I'll have to make specific rulings on each one of these taps.

MR. DOOLITTLE: Right.

THE COURT: So, as a result, right now will you take them seriatim and put them in the record and I will have decisions on each one of them.

MR. BOUSE: Well, your Honor, I should think at this point, and particularly in the light of Mr. Doolittle's [18] remarks that the hearing should be held so that your Honor can determine the fault of what Mr. Doolittle says, —what he says, of course, is not evidence with regard to these taps—so that you can determine who is the subscriber and what the warrant said. I mean, this is all very conclusory as far as Mr. Doolittle is concerned.

THE COURT: But before we get into that I would like on the record some identification of the number of taps so that from that I will proceed to follow a definite procedure. Obviously I am not going to be able to follow any procedure until we first have into the record the number of taps, who made the taps, where the taps were made, the time of the tap and whether or not it comes within the purview of People versus McCall or any of the statutes. And then from that we will give you an extensive decision in which the record will be protected for yourself and for the district attorney. All right.

* * * *

[23] MR. DOOLITTLE: But when I'm talking wiretaps to Laymen, I'm talking just about that, I'm talking about a taped recording of a telephone conversation. I'll be a little clearer to the jury now knowing that we don't want to get our nomenclature mixed up. I'm talking about monitored telephone conversations. As to those I'm sure Mr. Bouse concedes that he has no right to any hearing whatsoever on those. As to a bug which may be placed in a room which in turn is connected to a tape recorder, I'm sure under those circumstances where I can establish the person gave consent for the bug, and I'm saying that as an officer of this court, Mr. Bouse says I'm not under oath, but in effect I'm under oath when I'm telling the Court as a prosecutor what I intend to put. As to that bug, I think Mr. Bouse can also or probably [24] have to concede that legally he is not entitled to any inquiry at all on that. The only inquiry he's entitled to as to those particular tape recordings is whether or not the continuity has been established and whether or not those tape recordings actually reflect the conversation as

it existed. In other words, he can attack the credibility of those tapes and that's it.

Now, as to these two conversations, two or three, it is possibly one on Rocky Graziano which may or may not be played—in fact, it will be played, I'm pretty sure, but it affects Granello, and in affecting Granello because this is a conspiracy it is going to affect this man because it's a conversation made during the course of the conspiracy by what the People contend is one of the co-conspirators as to that conversation which is on Patrissy's Restaurant, and I say this as an officer of the Court only on Patrissy's Restaurant, not on any phone of Thomas Kaiser's, not on any phone subscribed to be any of the defendants in this case, as the other taps, the other two wiretaps, all pursuant to court order on the Headline Club in which none [25] of these defendants have any proprietary interests, and certainly this defendant does, I don't see how under any stretch of the imagination he is entitled to any inquiry on that.

* * * *

MR. DOOLITTLE: Now, may I just go one step further, your Honor, and I'll apprise the Court of the procedure in which the People intend to follow to put not only this monitored taped conversations into evidence and the bug but also the recorded wiretap pursuant to the Court order. I intend to have them physically marked for iden- [26] dentification. I intend before I put the substance and the core of the case in, I intend to lay a foundation through various expert witnesses as to the continuity of these tapes. At that point I'm not going to put them in evidence because they can't be placed in until they have some sense in the context of the statement of Irving Holzman who will be the key witness. It is while Irving Holzman is on the stand that I will offer it at that point to put them into evidence, but of necessity, Your Honor, they will have to be referred to as exhibits for identification by other witnesses on the stand before I ultimately put them in evidence. So I want to be perfectly candid with the Court as to procedure, I have to follow it, I have no other way to do it.

* * * *

THE COURT: One other point. As I understand, in the selection of the jury it is to be understood that you are not to use the word "wiretap" in the sense that wiretap is used.

MR. DOOLITTLE: Well, I'll use it as to these par-
[27] ticular conversations. I'll make it clear to the jury, and I think this is only fair.

THE COURT: No, I'm not going to let you use wiretap as we know wiretaps within the law until I have ruled on the admissibility of the wiretaps.

MR. DOOLITTLE: But, your Honor, you see, you are depriving not only myself but also this defendant of a very, very precious right. There may be one juror sitting in that jury seat who may have some sort of mental block against wiretaps, be it for them or be it against them, and if we can't inquire as to whether or not, regardless of what his personal feelings are, whether or not he will accept these into evidence if the Court permits them into evidence without putting his own interpretation on them.

THE COURT: Well, I'm making an analogy here, Mr. Doolittle, that if there were a confession in which we had a Huntley hearing and you are going to mention a confession to a jury, then ultimately the confession never gets to the jury, but he's heard confession in his mind and he keeps thinking about what happened to the confession, even though it is ruled inadmissible by the Judge,
[28] the word confession is in the mind of the jury. Now I'm making an analogy with the word "wiretap."

Now, it may very well be, it may very well be that if you feel you need this to be inquired into, the jurors on their selection, it may very well be that we will have to have the voir dire forthwith.

* * * *

[29] THE COURT: Now wait just a minute. So I can narrow the field. At this time all you are requesting is a voir dire. In essence, that's what it is, right On three wiretaps?

MR. BOUSE: I think it's two.

THE COURT: Well, you just said three.

MR. BOUSE: I think Mr. Doolittle said three.

MR. DOOLITTLE: Well, one is on Patrissy's phone. It has to do with a conversation by one Rocky Graziano with Sally Burns. It's during the course of the conspiracy and prior to the cessation of the conspiracy.

I might say this, your Honor, that the particular taps in which Kaiser is on is after the conspiracy has completed or ended and we are admitting these in the nature of admissions.

THE COURT: Wait. The only way that could be admitted if it is on the completion of a conspiracy is if it is [30] in furtherance of the conspiracy.

MR. DOOLITTLE: No, your Honor, any admission made by a co-conspirator at the conclusion of a conspiracy is admissible only as against that co-conspirator.

THE COURT: There is no question about that.

MR. DOOLITTLE: But it is clearly admissible. All of the admissions made during the course of the conspiracy as my understanding of the law is admissible against all co-conspirators, so that's why we have to put the statement of Granello in as being admissible against him.

I have no objection to giving him a voir dire on these particular tape recordings. The only problem is mechanically. That means I have to get my telephone man here, I have to go through all the evidence that I would have to go into, and I'm not prepared to do that. The Court will have to give me until at least tomorrow morning. I'd be afraid to start picking a jury but that's going to be one of the main questions I'm going to ask of the jurors. I just submit he has no standing here to oppose them anyhow.

[31] MR. BOUSE: As a matter of fact, your Honor, the very point that Mr. Doolittle makes about the defendant's position on those taps are the points that we are going to raise during the voir dire as to their admissibility against him, so I think your Honor will of necessity have to have a voir dire.

* * * *

[32] (The following occurred in the absence of the jury panel):

THE COURT: Now, I made up my mind as far as the question of the hearing on the wire tap. I am having the hearing first. That's it.

Now, it seems to me I am not going to allow anything to get into this trial which would in any way cast any question. When I impanel the jury on the voir dire, I want it to be first legally ruled upon by myself whether it is admissible or inadmissible, which will be the subject of a hearing first.

[33] MR. DOOLITTLE: Well, as I understand the [34] McCall case, maybe we had better get the ground rules squared away before we proceed because it is a novel sort of hearing.

* * * *

THE COURT: Well, I don't think there is any real [35] problem on it. I think you are all familiar with the case and I think the burden is upon you to show that the affiant, who made the affidavit, as the predicate for the issuance of the court order, put him on and let him testify as to what knowledge he had, subject to cross-examination, and at that time then further inquiry if other problems arise in the light of the decision, whether there are any allegations by the defendant as to whether or not any of the statements in the affidavit are perjurious. Then of course the burden will shift to the defendant to prove if that is or not. Whether there is any perjury embodied in it. I think the procedure is clear.

* * * *

[37] MR. DOOLITTLE: Your Honor, it is possible I may want tomorrow to argue against the giving of the hearing again because I don't know whether I may—

THE COURT: But be ready.

MR. DOOLITTLE: I'll be ready. I may try and dissuade the Court, or persuade the Court, not to proceed with the hearing. However, I will be ready to proceed with the hearing in any event.

THE COURT: Mr. Doolittle, it is just common sense to me that if you are going to plant a seed in any juror,

of the question in your voir dire, of a wire tap before you have a wire tap hearing, and assume for the sake of arguendo, for argument, that I would rule both wire taps inadmissible, meanwhile you are impaneling a jury and talking about wiretaps and I don't care by any legerdemain how you would do it, you couldn't wipe that out of their minds no matter what you did. I am going to make [38] sure that before the voir dire of the jury is selected, this jury is actually impaneled and sworn, either the wire taps are admissible or inadmissible and then if they are admissible I will let you talk about the wire taps and if they are inadmissible I won't let you talk about them.

MR. DOOLITTLE: Your Honor, I agree 100 percent with the Court's reasoning. Just one thing I want to leave the Court with, to sort of wrestle with this tonight, whether or not this defendant, Thomas R. Kaiser, is entitled to attack this.

THE COURT: Look, because he has a proprietory interest

MR. DOOLITTLE: Because he has no proprietory interest.

THE COURT: I wouldn't hold that.

MR. DOOLITTLE: He isn't even talking on this telephone that is being tapped.

THE COURT: I wouldn't care whether he has a proprietory interest or not, I am going to give him the hearing.

MR. DOOLITTLE: I will probably make another application. I will be ready to proceed.

[39] THE COURT: I can't see any logic in that, whether he has a proprietory interest or not. If this is a subject of evidence, it is going to be introduced and I think he is entitled to have a hearing to inquire into the probable cause of the tap.

MR. DOOLITTLE: I think in the McCall case it was either a subscriber or someone who had a proprietory interest.

THE COURT: I see what you are saying, but I think the law is coming around to—you see, what you are saying in order for him to exercise that right he would have

to have a proprietory interest, that is what you are saying.

MR. DOOLITTLE: I wouldn't dare guess what the Supreme Court of the United States is going to say but—

THE COURT: You mean you are just going to apply common sense.

MR. BOUSE: May I also leave you with a thought, if it is being used against him, according to the prosecution, it is the only thing they have and he has some kind of a vague interest in its outcome, it seems to me, whether you [40] call it proprietory or not.

THE COURT: You have already won your battle, I don't know what you are arguing about.

MR. BOUSE: He is leaving you with a thought and I don't want it to become an overpowering thought.

THE COURT: All right, tomorrow morning, gentlemen.

* * * *

[H 2*]

MINUTES OF WIRETAP HEARING

(The courtroom was thereupon cleared of all jurors.)

THE CLERK: People versus Thomas Kaiser. Case continued.

MR. DOOLITTLE: Your Honor, I would like to make a statement for the record before we proceed, if I may.

THE COURT: Yes.

[H 3] Let the record reflect here and now that the purpose of this hearing is to establish the admissibility or the inadmissibility of an offer of wiretaps. I have set out a procedure that I think I will follow and I am going to follow. Number one, I will determine the admissibility of inadmissibility before the impaneling of any jury and having been apprised of the offer by the district attorney

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[* The excerpts of the Wiretap Hearing are placed here in their proper chronological order. In transcribing the Hearing minutes, the Court Reporter paginated and bound them separately from the minutes of the trial proceedings. The Hearing minutes are here designated by an "H" preceding the original page designation.]

in the presence of defense counsel, as to which taps he is going to offer, of course, examined the order and all other papers and upon examination the Court has found that the orders that are the subject of this hearing were issued by a former Judge of the County Court, Judge Harold Spitzer. Obviously then it could not be forwarded to the Judge who issued the order which would be preferable under the McCall ruling to have him vacate that order or sustain it, depending on whether or not the probable cause or reasonable cause for the issuance of the wiretap was there.

Accordingly the record now reflects that I am determining de novo whether or not there exists reasonable cause for the issuance of the two wiretap orders; more specifically as to two telephone numbers. Do you want to put those in the record now?

[H 4] MR. DOOLITTLE: Yes, your Honor. One of them is 212—that is Code 212 LW 4-2523.

THE COURT: And the other one?

MR. DOOLITTLE: And the other one was on 212 numbers. One tap was on 212 numbers, Code 212 CA 6-8509 and 212 CA 6-8854.

THE COURT: Just for the record, so that there can be a little more distinction, the LW number is the Headliner Bar?

MR. DOOLITTLE: The Headliner Bar or is it the Headliner Club? Either the Headliner Bar or the Headliner Club.

THE COURT: And the other?

MR. DOOLITTLE: The others are on Patrice's Restaurant, both of them, in New York City, in the Borough of Manhattan.

THE COURT: Now, I don't know what you intend to do, Mr. Doolittle, but I am going to set this course for you: I am going to direct you, since a hearing has been requested by this defendant, that you turn over to him the affidavit which was the predicate for the issuance of the wiretap together with any other supplemental information which was taken by the Judge in relation to the [H 5] issuance of this wiretap and also that the subject wiretaps be identified so that if and when I rule on the

admissibility the record will reflect which ones are being the subject of my ruling.

All right, now we can proceed. Now do you wish to make a statement?

MR. DOOLITTLE: Yes, I would like to make a statement on procedure, your Honor.

THE COURT: Yes?

MR. DOOLITTLE: What procedure is to be followed? I agree—I was going to offer into evidence, at least have the Court take judicial notice of the Court Order together with the affidavits which I think this Court would have to do because it is an Order of this Court. In such event, of course, I was going to show it to Mr. Bouse. In addition to that I was going to put on the stand Donald J. White who was the confidential reporter who took down the testimony of Mr. Norman J. Levy, the Assistant District Attorney, who made the application and the affidavit before Judge Spitzer and through him I was going to offer into evidence a copy of the testimony which the Court has—

THE COURT: Either that way or state for the record [H 6] if Mr. Levy is available to identify the exhibit or in the alternative you can use the stenographer.

MR. DOOLITTLE: I think the stenographer would be the best evidence of it.

THE COURT: As long as you give me the foundation.

MR. DOOLITTLE: He is the one who transcribed it and he is the one who took it and also typed it himself.

THE COURT: That's all right, that would be all right, but the proper foundation has to be laid. I would like you to consider one other thought though.

MR. DOOLITTLE: Yes, sir.

THE COURT: If there is anything in your proof which will give an independent verification of what the person who related the facts to the affiant, I would suggest that you give that as part of your foundation.

MR. DOOLITTLE: Well now—

THE COURT: I understand that this is not the usual informer situation.

MR. DOOLITTLE: Not only that. May I be heard on that?

THE COURT: You can make a statement.

MR. DOOLITTLE: Yes.

THE COURT: Go ahead, I will allow it.

MR. DOOLITTLE: Especially in response to the [H 7] Court's suggestion, I know it is a suggestion because there are not guidelines whatsoever. This is probably the first such hearing that I am aware of in any Court that I know of, certainly none in this Court, which has been had on this particular procedure under the McCall case.

I would like to say this: I think what the Court is suggesting—I may be wrong—that not only the affiant be put on, but also one of the persons who might have given information to the affiant. This is what I seem to get from the Court's suggestion.

THE COURT: No.

MR. DOOLITTLE: If I do that I am going to try my whole case.

THE COURT: No; you don't. No.

MR. DOOLITTLE: I would like to say this—

THE COURT: I think you must have misunderstood me. You make your statement and then I will tell you.

MR. DOOLITTLE: I was going to say in view of the fact there are no guidelines and the only issue here is whether or not there was reasonable cause and reasonable grounds for issuing the eavesdrop order, now, I think in this particular instance the Assistant District Attorney, Norman Levy, was the affiant and he was also the testi- [H 8] fier before Judge Spitzer on the sworn testimony. He testified as to facts that were narrated to him by one Irving Holzman. There was not even an attempt to withhold the name because it was not an informer situation. This was Irving Holzman who was the victim of the alleged crime.

In adidtion to that I think the Court, having heard the testimony, he also stated that his investigation was not only based on what Mr. Holzman said, but on the fact that he himself had monitored certain conversations.

THE COURT: That is the point I am getting at.

MR. DOOLITTLE: But that is right in the testimony.

THE COURT: Yes.

MR. DOOLITTLE: If Mr. Levy takes the stand now—

THE COURT: But you didn't get my point.

MR. DOOLITTLE: I guess I didn't. I don't see what Mr. Levy can add to it.

THE COURT: I said to you since within the supplemental affidavit which was the subject of an independent inquiry by the Judge who signed the wiretap order, as I read this last night, I found that there were monitored phone calls, the monitoring of these phone calls were used as a predicate in the sense that it was given to the Judge who issued the order as a basis of an independent verifi- [H 9] cation of what Holzman told the affiant, that this monitored telephone call was a verification, an independent verification that this thing occurred.

MR. DOOLITTLE: Right. [THE COURT:] Now, what I am saying to you is this: If you wanted to present that as an additional verification or whether or not you wanted to rest upon the inquiry made by the Judge who issued the wiretap and place your reliance upon other verification, if any, in the supplemental affidavit, that is a choice for you to make, but I just wanted to bring to your attention that even though he is not an informer in the sense that we are thinking of, and under the decisional cases that have come out, there is a distinction here. This man is the victim and it is one step closer and obviously all that is needed then is some independent factual investigation or proof of the reliability of the victim's information to the affiant. In other words I am not talking about the reliability of the informer, I am talking about the independent investigation of what the victim said to the affiant. Now whether or not you want to rely upon what is in the sworn testimony taken by Judge Spitzer, I just thought I should bring to your attention to the [H 10] point that when I read this, I found that a monitored telephone call was used and was the basis of the Judge's evaluation of whether or not the victim was telling the affiant the truth or whether there was any verification.

MR. DOOLITTLE: Right. Now, may I follow along that line, your Honor? In effect, what you have is Levy testifying, assistant district attorney Levy testifying not only as to what Holzman told him, but to what his inde-

pendent investigation showed by monitoring of this telephone call. Now, to put him on the stand or to play that tap would not be our particular province. In other words the only issue here is was Norman Levy—if the defendant wanted a hearing, he has got to contend that that particular testimony of Levy was prejurious.

THE COURT: Well, that is the second stage.

MR. DOOLITTLE: Well, I mean—

THE COURT: There are two stages. First that the reasonable cause for the wiretap is issued, then if he takes the position as to whether or not what is embodied which is the predicate upon which the Judge issued the wiretap was prejurious, well, in that instance then the burden shifts and it goes to Mr. Bouse.

MR. DOOLITLE: Well, that is the way I feel. I feel [H 11] that the minutes of this particular hearing—not hearing—the ex-parte hearing before Judge Spitzer are sufficient reasonable grounds and that is what I was going to do.

THE COURT: I am not saying it isn't. I thought I would forewarn you so that if you wanted to present anything I gave you an opportunity since we are here channeling new bypasses and byways.

MR. DOOLITTLE: I just don't want to be in the position of rolling the dice and then finding out that really I rolled them the wrong way, so I think soundly—

THE COURT: I am not going to roll your dice for you.

MR. DOOLITTLE: I know that, Your Honor, but this being a novel situation and this being a matter in which there are no guidelines, I am actually going to present the minutes and that's it. I think that should be sufficient. I cannot see what Mr. Levy could contribute other than to go through all of his testimony in there.

THE COURT: All right, go ahead. You made your opening statement.

MR. DOOLITTLE: Right.

THE COURT: What do you wish to do?

MR. DOOLITTLE: All right, if your Honor please, I [H 12] am going to ask the Court to take judicial notice or I will offer in evidence the two respective Court Ord-

ers one for the interception of certain telephone conversations on 212- LW 4-2523, signed July 1st, by Harold Spitzer, Judge of the County Court of Nassau County, which order was effective up to the 29th day of August, 1964.

THE COURT: What date?

MR. DOOLITTLE: August, effective up to August 29, 1964, and it was signed on July 1st, 1964 and together with that particular exhibit, as part of that exhibit, I also would like to offer the petition of Norman Levy which accompanied the order.

MR. BOUSE: Your Honor, I presume—

THE COURT: Just a minute. What else are you offering with that?

MR. DOOLITTLE: I am going to offer them one at a time.

THE COURT: All right.

MR. BOUSE: I presume—

THE COURT: He is offering it and I will let you look at it. What do you want to say?

MR. BOUSE: I presume that these are being offered in evidence for the purpose of this hearing only?

THE COURT: Oh yes.

[H 13] MR. BOUSE: Inasmuch as their admissibility is in issue.

THE COURT: That's right. I haven't determined whether they are admissible or inadmissible yet. They are just being offered.

(The above-mentioned document was thereupon marked People's Exhibit 1 in evidence.)

MR. DOOLITTLE: I am going to offer—

THE COURT: Wait just a minute. It was offered. Do you have any objection for the record?

MR. BOUSE: Well, if it is for the purpose of this hearing only and we're going to determine its admissibility eventually, I have no objection. All right.

THE COURT: All right, fine. I just wanted the record to reflect that is so, so that the record is complete. All right.

MR. DOOLITTLE: I am offering as People's Exhibit 2 the Court Order in the matter of the application of Nor-

man Levy, an Assistant District Attorney of the County of Nassau, for an Order for interception of certain telephone communications 212 - CA 6-8509; CA 6-8854, which Court Order was signed by Judge Harold Spitzer of the County Court of Nassau County on July 1st, 1964, in wh' [H 14] said order was to be effective and in force until the 29th day of August, 1964.

THE COURT: Any objection?

MR. BOUSE: No, under the same conditions.

THE COURT: All right.

(The above-mentioned document was thereupon marked People's Exhibit 2 in evidence.)

MR. BOUSE: I assume you intend for me to get copies of these?

THE COURT: Well, you can look at them. I will give you time to look at them. Take them and look at them.

MR. DOOLITTLE: If I may just use them in the meantime, I want to put Mr. White on.

THE COURT: He is trying to get everything in and then we will let you have them, Mr. Bouse.

MR. DOOLITTLE: May I call Donald J. White to the witness stand, please.

THE COURT: Yes, please.

DONALD J. WHITE, reiding at 247 North Delaware Avenue, North Massapequa, L.I., New York, having been called as a witness on behalf of the People, was duly sworn and testified as follows:

MR. DOOLITTLE: Judge, I think you have my copies, [H 15] may I have them?

THE COURT: I beg your pardon.

MR. DOOLITTLE: I think you have my copies, may I have them back?

THE COURT: I don't know whether they are yours. No, I don't have your copies.

MR. DOOLITTLE: I gave them to Mr. Roberto last night.

THE COURT: The only copies I have are the carbon copies.

MR. DOOLITTLE: The originals. Yes. I would like to have them marked in evidence.

THE COURT: Where are the originals?

MR. DOOLITTLE: I don't know, wherever Judge Spitzer left his files, I don't know. There is no problem about the carbons being offered in evidence because if the man who typed them up himself is here—

THE COURT: All right.

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. White, you are employed by the District Attorney's Office as a confidential reporter, is that correct?

A Yes, sir.

Q What are your functions?

[H 16] A As confidential reporter I report verbatim and transcribe the proceedings of the Grand Jurys of Nassau County and statements and other matters taken in connection with the District Attorney's investigations.

MR. DOOLITTLE: Do you concede his qualifications?

MR. BOUSE: Oh yes, no question.

MR. DOOLITTLE: For the record, Mr. Bouse advises me that he will concede Mr. White's qualifications.

Q Mr. White, did you have occasion on July 1st, 1964, to be present in Judge Harold Spitzer's chambers here in the County Court, together with Mr. Norman J. Levy, an Assistant District Attorney?

A Yes, sir.

Q Did Mr. Levy give certain sworn testimony relative to an application for an order for the interception of certain telephone communications?

MR. BOUSE: Now I am going to object to the leading nature of that, if your Honor please.

MR. DOOLITTLE: It is just introductory.

MR. BOUSE: He is concluding that it was sworn testimony.

THE COURT: All right, I will sustain it. Just ask him.

[H 17] Q Did he give certain testimony relative to getting a wiretap on the Headliner and Patrice's Restaurant?

A Yes, sir; he did.
Q Was that testimony sworn or was it not sworn?
A It was sworn testimony.
Q Who administered the oath?
A Judge Spitzer.
Q I see. Did you transcribe each and everything that was said after Mr. Levy was sworn from the beginning of his testimony until the completion of his testimony?
A Yes, sir; I did.
Q What did you take this on, a stenotype machine, sir?
A Yes, sir.
Q After you took it on the stenotype machine, what, if anything, did you do relative to that particular testimony?
A I brought the stenotype notes back upstairs to the office and transcribed it by means of a typewriter. When the typewritten statement was finished I compared it with the stenographic notes, then submitted it.
Q Now, I show you—
THE COURT: Did you check your stenographic notes against the transcript?
THE WITNESS: Yes, sir; your Honor.
[H 18] THE COURT: Did you find it to be accurate?
THE WITNESS: Yes, your Honor.
Q I show you this manuscript consisting of—how many pages is it, Mr. White?
A Thirty-four.
Q Are you familiar with that paper, have you seen that before?
A Yes, sir.
Q Is that the transcript that you made of the recorded notes relative to the testimony of Mr. Levy concerning the Headliner Bar?
A Yes, sir; it is.
Q That is a carbon copy, is that correct?
A Yes, sir.
Q You typed that yourself?
A Yes, I typed an original and two carbon copies.
Q Is that an accurate transcription of everything that was said from the time Mr. Levy got under oath until his testimony relative to the Headliner Bar was completed?

A Yes, sir; it is.

MR. DOOLITTLE: Offer that in evidence and I ask that it be marked People's Exhibit IA, if your Honor please, so it will have some relevance to People's Exhib-
[H 19] it 1.

THE COURT: Show it to Mr. Bouse.

MR. BOUSE: Your Honor, if there are no further questions, Mr. Doolittle has of this witness,—

THE COURT: Evidently, he has further offers.

MR. BOUSE: Let him offer them both and then we can have a voir dire and cross examination.

THE COURT: All right, fine. Instead of IA, mark it 3.

MR. DOOLITTLE: It is going to have some relevancy to People's Exhibit 1.

THE COURT: All right, fine, 1A.

(The above-mentioned document was thereupon marked People's Exhibit 1A for Identification.)

MR. DOOLITTLE: Ask that this transcript be marked People's Exhibit 2A for Identification.

(The above-mentioned document was thereupon marked People's Exhibit 2A for Identification.)

Q Mr. White, at the same time that Mr. Levy made an application for an intercept order on the Headliner Bar, did he also in your presence under oath make an application for an intercept order for Patrissy's Restaurant?

MR. BOUSE: May we have the date?

[H 20] THE WITNESS: July 1st.

Q July 1st?

A Yes, sir.

Q Was his narration of the facts, was that done individually or all done at once or one at a time, how was it done?

A It was one at a time. The original application was made and then the testimony and then another application was made and then the testimony from the first application was incorporated with the exception that on the second application after the testimony there was some colloquy and that was taken down.

Q Did you record everything, all the colloquy between the Court and Judge Spitzer—between Judge Spitzer and Mr. Levy?

A Yes, sir; I did.

Q Now, People's Exhibit 2A for Identification, is that an accurate, complete and accurate transcription of all the sworn testimony of Norman J. Levy, relative to the intercept order for the phones at Patrissy's Restaurant?

A Yes, sir, it is.

Q Did you type that yourself?

A Yes, this was prepared in the same manner, typed [H 21] from my stenotype notes, then compared for accuracy with the stenotype notes and then submitted. I found it to be accurate.

Q Incidentally, both People's Exhibits 1A and 2A for Identification are carbon copies, is that correct, sir?

A Yes, sir.

Q How many originals, what did you make, one original and how many carbons?

A One original and two carbons. However, there was an original on each number.

Q I see.

A So that there were two originals and four carbons but they were made separately.

Q I see.

A An original and two carbons on number one and an original and two carbons on number two.

Q Those carbons are both from the originals you typed yourself?

A Yes, sir.

THE COURT: So except for what is actually the telephone number on IA and IB—rather IA and 2A, the substance of both these are identical.

THE WITNESS: Yes, Your Honor.

[H 22] MR. DOOLITTLE: I offer them both in evidence, your Honor, and I have no further questions of Mr. White.

THE COURT: All right.

MR. BOUSE: May we have a short period to examine this?

THE COURT: Well, you see, the substance is not important, just whether—

MR. BOUSE: Well, it would seem to me that the sufficiency of the evidence that was received or the testimony that was received by Judge Spitzer would be important so it will be necessary for me to examine the testimony as it was offered to see if it was sufficient.

THE COURT: No, I don't see that at all.

MR. BOUSE: That is what the McCall Case—

THE COURT: All we're concerned with here, Mr. Bouse—

MR. BOUSE: Excuse me.

THE COURT: All we're concerned with here is whether or not it was taken and how it was taken. The substantive part of that has nothing to do with it at this time.

MR. BOUSE: You mean this particular witness?

THE COURT: Yes.

MR. BOUSE: But I may want to raise a question as to actually what did happen in there at the time and the [H 23] question may raise itself if I am allowed to peruse the exhibits.

THE COURT: I will allow you to look at them.

MR. BOUSE: That is all I want.

THE COURT: As to this witness, I don't see any materiality in going into the substantive aspect.

MR. BOUSE: Neither do I.

THE COURT: Except as to accuracy.

MR. BOUSE: Neither do I.

THE COURT: Or as to any of the foundations as to how it was taken or whether it was sworn or not. Of course you have unlimited inquiry.

MR. BOUSE: You are quite correct, his act was a mechanical act and that would be the only basis of my examination, but a question may be raised within the exhibits as they are offered as to the mechanics. It may not. Probably won't.

THE COURT: Go ahead and ask him.

MR. BOUSE: I just need about two minutes to look at them.

THE COURT: All right, go ahead.

[H 24] CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. White, can you tell us who else was in the room, in the chambers of Judge Spitzer at the time that you were taking this testimony of Assistant District Attorney Norman Levy?

A Judge Spitzer, Mr. Levy and myself.

Q How long would you say this interview went on?

A I don't have any recollection of that. I guess maybe ten minutes.

Q And the testimony that you recorded would be partly given in narrative form by Mr. Levy with questions occasionally asked by Judge Spitzer, is that how it went?

A Yes, sir.

MR. BOUSE: I have no further questions.

THE COURT: All right, mark them, that goes for the two exhibits, Mr. Bouse. Mr. Bouse, any objections as to the two exhibits?

MR. BOUSE: No.

THE COURT: All right, mark them.

MR. DOOLITTLE: I have no further questions. Thank you, Mr. White.

THE COURT: You may step down.

[H 25] (People's Exhibits 1A and 2A for Identification were thereupon received and marked in evidence.)

THE COURT: All right, anything else?

MR. DOOLITTLE: Your Honor, I submit that the People have now established that there was reasonable ground but the introduction of this testimony and accordingly that is the People's case as far as the hearing is concerned.

THE COURT: All right. Now Mr. Bouse, I think you should be afforded an opportunity to read that.

MR. BOUSE: Yes, and Judge—

THE COURT: He is resting now so I am going to allow you to look through them, peruse them in the courtroom here and then I will give you a short recess. I do not want these to be taken out of the courtroom.

* * * *

[H 28] MR. BOUSE: At this time defendant Kaiser, keeping in mind your Honor's outline of what the purpose of this hearing was, to determine the admissibility of an offer of wiretaps and that your Honor is determining de novo the sufficiency—

THE COURT: Based on what is offered.

MR. BOUSE: Based upon what is offered, yes. The [H 29] defendant moves to suppress the wiretap evidence on the following grounds:—

THE COURT: Not to suppress it, to have it declared inadmissible is the proper term.

MR. BOUSE: To have it declared inadmissible on these grounds: Number one, the paper submittal in particular the petition of Mr. Levy is clearly insufficient under the McCall ruling.

Now first of all—

THE COURT: Tell me why you say that?

MR. BOUSE: Well, that is what I am getting to.

If your Honor would want one copy of this so that I can refer to it, I think they are similar and we can both be looking at the same matter.

The petition of Mr. Levy is a formal petition, as your Honor can readily determine, with some twelve or fifteen insertions.

Now of course this petition was made two years before the McCall case, but at any rate when Mr. Levy refers to his information and belief he does not state what information he has, you see. The McCall case says that makes a petition defective. He gives no reason in his petition as to why he believes the McCall case again [H 30] says that makes the petition defective. There is no factual statement of the affiant's experience with his informer's reliability.

Again, the McCall case says that makes a petition defective and finally there is no statement in Mr. Levy's petition as presented to Judge Spitzer of any factual showing of what was revealed to him to cause him to make the petition.

Finally, the McCall case makes the petition defective. So I think we can concluded that if the matter rested just on the petition, the petition of Mr. Levy, there would be

no question that there was no ground, no reasonable ground upon which to issue a wiretap order, albeit they were using the same petition as a form, but under the new McCall ruling they would be clearly insufficient today.

Now with regard to the other testimony that Mr. Levy gave before Judge Spitzer, it is completely hearsay from one Holzman. Now again the McCall Case says that there must be a factual showing of Levy's experience with his informer's reliability.

Here you have a convicted felon and I am sure your Honor is acquainted sufficiently with Holzman's background to know that at least the reliability of the informant might be in issue as far as any Judge would be [H 31] concerned who is going to sign an order based solely upon hearsay from Holzman through Levy to the Judge, that would be the minimum test that any inquiring Judge might make, but here we have the assistant district attorney in the Judge's chambers, with no one else and he doesn't present Holzman or Mrs. Holzman or anybody else to substantiate the allegations that he says Holzman told him.

Now, if you take these allegations at their best, at their absolute best, there is no showing that a crime was being committed either by Granello or Conte against whom the order is signed. There is absolutely no showing of that. There is a showing of an argument, there is some inuendo in there, but there is no showing that a crime is being committed or that there is an extortion or anything. Someone wants $25,000 for something to do with a business and that's it. There is something vague, some vague reference to Mrs. Holzman being knocked down by some unidentified persons who have as yet not been apprehended, but nothing to show that a crime was being committed or that a wiretap order would reveal evidence or give evidence as to that particular crime. And of course in line with that there is certainly no showing that Kaiser—and you will note that his name is very conspicuous by its [H 32] absence—was involved in any of this.

Now, it is again the contention of the defendant that Judge Spitzer, County Court Judge, had no jurisdiction to

sign any order affecting a phone out of his jurisdiction which would have been the County of Nassau. Here we have two Metropolitan phone numbers, the subjects of these tap orders.

Now finally, if your Honor finds that there was, after wading through the testimony of Assistant District Attorney Levy, if your Honor finds that there was reasonable ground to believe that a crime, some crime was being committed, there is no showing that that crime was being committed in the County of Nassau. If there was any extortion taking place and you want to construe the conversation that was related by Mr. Levy in Judge Spitzer's chambers, those conversations were all in New York at the Charles French Restaurant or some other place, but here we have a County Court Judge of the County of Nassau signing a wiretap order for two phones in Manhattan where, if any crime was being committed, it was being committed in Manhattan, that was clearly outside of his jurisdiction.

Now of course the orders, if you find that the orders [H 33] were properly issued and that there was sufficiency, which I think clearly there was not, but if your Honor finds that there was sufficiency, they are clearly inapplicable as far as the defendant Kaiser is concerned. He is not named on any of them. As far as he was concerned, it was the result of a fishing expedition and they just happened to pick up his call coming in to one of those numbers.

Now, if we follow Judge Desmond's philosophy in the McCall Case, where he concurred on different grounds, he believes all wiretaps are violative of the fourth and fifth amendment to the Constitution of the United States.

THE COURT: Now we're getting into something else.

MR. BOUSE: No, but if you want to go that far—.

THE COURT: Have you finished?

MR. BOUSE: No.

THE COURT: You see, you can talk about the constitutionality and Judge Fuld and Judge Desmond agree on this point as to what their opposition to the admissions of wiretap is, but I would rather have you continue at this point, if you will, on what you say are the in-

adequacies of the wiretap order and the affidavits which were the predicate, assume for the sake of arguendo [H 34] at this time that they are admissible because of the State Law, even though Judge Desmond and Judge Fuld may ultimately—their opinion may ultimately be the majority opinion. At the present time they are the minority opinion, you understand that.

MR. BOUSE: I understand that.

THE COURT: So if you confine yourself to any other arguments that you may have as to the inadequacies or the illegality of the wiretap, I would appreciate that.

MR. BOUSE: Well, I am going to refrain from attacking the wiretap as far as relevancy is concerned. I think we have a tap not in furtherance of a conspiracy admittedly by the prosecution, but allegedly showing admissions.

THE COURT: I didn't hear any such admissions, but go ahead.

MR. BOUSE: Well, I have been living with Mr. Doolittle on this case and I think somewhere I thought it was yesterday, but it may have been last week, where Mr. Doolittle indicated this tap was not in furtherance of the conspiracy, but an admission of having had a part in it. I think he made that yesterday, your Honor, before lunch.

THE COURT: I am not concerned with that now. All I am concerned with is whether the predicate for the [H 35] reasonable cause for the wiretap, whether or not there was reasonable cause to issue the wiretap.

MR. BOUSE: Yes, of course sufficient—just to sum it up and it is on those grounds that I have given your Honor that the petition of Norman Levy was insufficient. He didn't state the information, he didn't state why he believed the information and he didn't show the affiant's or his experience with the affiant's reliability and there was no showing in the petition as to what was revealed. Those are the grounds for the petition not being good. As far as the testimony is concerned, that has to met the same test. It is completely hearsay testimony from Holzman. No factual showing, no ground upon which the affiant says he relies on the story of Holzman and as a matter of fact Holzman becomes a questionable figure throughout this matter.

There was no showing that a crime was being committed by Granello and Conte. There was no showing that it was within this jurisdiction, if it was being committed, and fourth, we have the Judge signing the tap order for a jurisdiction other than his own. He was not a Supreme [H 36] Court Judge, he was a County Court Judge.

THE COURT: Let me ask you this: I am sure you are familiar with the McCall case. You see, the McCall case dealt with an informer and the question of the affiant's experience with the informer's reliability. They went into the question that there should be some factual showing, but here we have the victim who is relating this to the affiant, Mr. Levy. Now, I have given you an opportunity and I think it is the first time it has ever been done, of your being allowed to not only look at the basic affidavit of Mr. Levy, and I would say this very frankly to you, if this were the only thing I had in front of me, there is no question that it would be inadmissible, but we have in evidence 1A and 2A which is a complete supplemental inquiry by Judge Spitzer in which he went into and interrogated Mr. Levy as to whether or not—I call your attention specifically to whether or not he asked Mr. Levy whether or not he had made any independent investigations as to the assault upon Mrs. Holzman, you recall that.

MR. BOUSE: Yes, where it was said that it is under investigation, not that he made any—

THE COURT: But he said it had been checked out. [H 37] Also, Judge Spitzer said, he wanted to know what else and there was also the neighbor. Then you will recall there were these monitored telephone calls from the drug store, remember that?

MR. BOUSE: Yes.

THE COURT: That I think—and there are other instances—you see, here the Judge was inquiring for independent acts, observations and statements to give him an evaluation of the reliability of what Holzman was telling Mr. Levy. See, it is not a question of an informer and whether or not in the past he was reliable. It is just a question of whether the facts that Holzman told Levy were—or there were some credibility to that or independ-

ent checking. You see, within those exhibits, 1A and 2A, I find that.

Now, the only question, and I would like the district attorney to devote his argument to this, is there is some question raised about the authority of the Judge to sign a wiretap order for New York telephones. That is what Mr. Bouse is claiming.

MR. BOUSE: His jurisdiction is just County-wide, as far as I can see.

THE COURT: I beg your pardon?

[H 38] MR. BOUSE: May I make some comment on what your Honor said? It seems to me unreasonable—.

THE COURT: Didn't you just mention that to me?

MR. BOUSE: Yes.

THE COURT: Didn't you say that Judge Spitzer—didn't you just make the argument that he did not have authority to tap this wire?

MR. BOUSE: Correct.

THE COURT: Since it wasn't a Nassau County telephone?

MR. BOUSE: Correct. I did.

MR. DOOLITTLE: I have never heard that argument. It is a novel argument.

MR. BOUSE: This is a novel proceeding.

MR. DOOLITTLE: This is like saying a warrant issued by a County Court Judge cannot be executed in New York County.

MR. BOUSE: It is completely different.

MR. DOOLITTLE: Which is obviously false. This is an order of the County Court. It happens to be sitting in the County of Nassau where, as for example, a Grand Jury only has jurisdiction of crimes within this County, certainly the County Court of Nassau County on a change [H 39] of venue can try a crime committed in another county.

THE COURT: That is not what he is saying.

MR. DOOLITTLE: No?

THE COURT: That is not his argument.

MR. DOOLITTLE: I don't understand the restricted view that a Judge of this County, where a crime is apparently being committed in this County, alleged to be

partialy committed in this County and another County, in other words this was a conspiracy, this was an attempted extortion, which, of necessity, involved two counties.

THE COURT: I think it is academic. We have already had a recent decision where it is committed in two counties on the question of jurisdiction.

MR. DOOLITTLE: Right.

THE COURT: But he is not saying that. He wants to know from you and I want to hear from you what you have to say.

What he is saying is this: What authority did the County Judge have to issue a wiretap order on a phone that is in New York?

MR. DOOLITTLE: I say that is inherent in his power. If the facts before him show that he has some jurisdiction over the crime. The same thing would be true as I [H 40] say, of a Judge issuing a warrant.

THE COURT: In other words your argument is this: If the crime was partly committed in Nassau and partly in New York, then he has authority to issue a wiretap order on a New York telephone?

MR. DOOLITTLE: Right.

THE COURT: That is your argument?

MR. DOOLITTLE: Right. Yes.

HE COURT: First of all, in looking at this de novo, is this a New York telephone or is it not a New York telephone? Nobody has told me whether it is or not.

MR. DOOLITTLE: I think I specified that, your Honor, that the code number 212, which is New York City, that is the five boroughs of New York City—

THE COURT: There is nothing on the record that you are—

MR. DOOLITTLE: I am acknowledging that these taps were in the Headliner Bar in New York City and Patrissy's Restaurant in New York City, no question about that, no question about that at all. I say that is an inherent power of this Court where a crime is partially committed—

THE COURT: All right.

Now, what do you say to his argument? What do you [H 41] say is in Exhibits 1A and 2A?

Frankly, I tell you this exhibit 1 and 2, the affidavit of Mr. Levy, if they were the only predicate for the wiretap, of course as I said, the wiretaps would be inadmissible. The affidavit itself is inconclusive.

MR. DOOLITTLE: I concede that is precisely why we go through the procedure we do.

THE COURT: In other words the whole predicate is 1A and 2A.

Now, you tell me what independent observations, acts or investigations were made in either one of those exhibits which would lend some credibility to Holzman, in the light of what Mr. Bouse said, his questionable integrity and character and all that. He is saying that whether it is true or not doesn't make any difference.

MR. DOOLITTLE: That's right.

THE COURT: But he has made that assertion.

MR. DOOLITTLE: Well, it is a statement, your Honor. It is a statement at this point for the purpose of this motion without any foundation and only for the purpose of this motion. There is no evidence to substantiate that.

THE COURT: No question.

MR. DOOLITTLE: It well may be true, but in and of [H 42] itself—

THE COURT: He is not saying that he is the informer, he is saying that Holzman's testimony is incredible and without it being checked that there should be something wherein 1A and 2A, something in there to substantiate the credibility of what Holzman told Levy and I want to know from you what do you say is in 1A and 2A that gives that independent observation, independent factual showing that shows that there is some substance or truth to what Holzman has said. That's all.

MR. DOOLITTLE: I will answer that, your Honor, but may I just comment, your Honor, on the fact that the Court says that the affidavit in and of itself is not sufficient. I agree to that, but if you notice that printed order, we printed it up especially which says upon the annexed petition of Norman J. Levy and the sworn testimony—

THE COURT: I read that.

MR. DOOLITTLE: We, as a matter of practice, always put sworn testimony in when the Rackets Bureau comes in with an application.

Now, as to what additional evidence there is other than the statements made by Irving Holzman, there is the statement, the investigation of the assault—

[H 43] THE COURT: You want to delete it from the record? Look at 1A and 2A, just point out to me what you say there is.

MR. DOOLITTLE: There is the testimony of Norman Levy about the monitored phone call which he overheard between —

THE COURT: What is there about that phone call that lends credibility to Holzman's story?

MR. DOOLITTLE: I wil have to read it, it is a verbatim conversation.

THE COURT: You tell me in essence what it is.

MR. DOOLITTLE: In essence it was an attempt on that phone call, I think certainly it could be read into that phone call, an attempt to extort money from Irving Holzman. That, coupled with the facts narrated to Mr. Levy by Mrs. Holzman, the facts narrated to Mr. Levy as stated in here by Delores Billings, by Joey Albino, all of these facts indicate that there was sufficient reasonable grounds, your Honor, it just wasn't based solely and exclusively on the testimony of Mr. Holzman, on the statements made by Mr. Holzman.

This is unique in that, number one, you have a victim, not an informer. Generally, usually the case says all you [H 44] need is an informer and we must know him to be reliable, and that would be sufficient. Here far more work and investigation was done and it is all stated in here.

THE COURT: What else did you find there that you want to bring to my attention?

MR. DOOLITTLE: The fact that a neighbor had been examined and she corroborated. So therefore you get down to the credibility of Mr. Levy.

THE COURT: Go ahead.

MR. DOOLITTLE: I think that in substance is it.

THE COURT: Do you have anything else you want to bring to my attention? Those are the two things that I saw myself.

MR. DOOLITTLE: Well, I know the Court read this.

THE COURT: There is no question that I read it. I not only read the affidavit, but I read the supplemental inquiry by Judge Spitzer and went through it very thoroughly.

MR. DOOLITTLE: As I say, the statements made to Holzman by Mrs. Holzman, by Delores Billings, by Joey Albino, by the neighbor, to the attack on Mrs. Holzman, by his own independent monitoring of the telephone call [H 45] that was made and I think these are all—

THE COURT: Do you want to add anything else?

MR. DOOLITTLE: These involve the credibility of Mr. Levy himself.

MR. BOUSE: All the people who spoke of these particular attacks, none of these are crimes that were in any way connected with Granello and Conte, no probative effect.

THE COURT: Mr. Bouse, you know that for the predicate for a wiretap you need reasonable cause. You don't have to have the proof of the substantive crime, but at least a connection with the persons against whom you are trying to get the tap order.

There is another ground that I would like to inquire into and I think before I pass on this I will. It will take a few minutes for me to check it out, but is there anything else you want to tell me? Now, do you want to go into the constitutionality?

MR. BOUSE: No, I would like to linger on this a moment more, if your Honor please.

I don't see any good reason why the reliability of a victim should not—an alleged victim—don't forget, he is not bleeding all over the floor or anything—why the reliability [H 46] of an alleged victim should not be examined as closely as the reliability of an informer for this reason: There has been no substantiation outside of the alleged victim as to the alleged crimes perpetrated upon him. No corroboration that such crimes ever occurred. No more salient proof could be shown than the fact that two years later they have not been able to identify their assailants. So that raises a serious question as to whether these acts even in fact occurred which would throw us back to—

THE COURT: But you read that, you read that in there. There is some question about the assault upon Mrs. Holzman—

MR. BOUSE: I was getting to that point. That point is this: They doll up this transcript with Levy's sworn testimony who can't speak first hand about anything. The People whose testimony should have been sworn and heard by Judge Spitzer, Delores Billings, Mr. Holzman, Irving, those are the people who should have been giving sworn testimony, but they bring in Levy who can swear these—they said things to him and I'm not in any sense attacking Mr. Levy's credibility, but this is rank hearsay. There is no independent showing that a crime was committed, [H 47] no corroboration, no showing of reliability of the people involved as far as the truthfulness of what they told Levy is concerned.

THE COURT: Now, what else do you want to tell me? We have gone over that. What else do you want to tell me about the constitutionality? You said you wanted to mention something on the record and I will let you do that, if you want to.

MR. BOUSE: Constitutionality?

THE COURT: I just agree with Judge Fuld and Judge Desmond.

MR. BOUSE: I agree with Judge—

THE COURT: Wiretaps per se shouldn't be allowed in because it is violative of the Fourth—

MR. BOUSE: The Fourth and Fifth Amendment. I don't think there is any question on the constitutional ground that that would keep them, make them inadmissible in all Courts in the Country, not that they are.

THE COURT: There was a very recent case, the United States Supreme Court Case where certiorari was denied so I see no indication that the decision is not the law.

MR. BOUSE: No, but I think if your Honor looks at this tap, not the substance of it, of course, but the time [H 48] at which it was perpetrated as far as the defendant Kaiser was concerned, who was not named on the order, was not the subject of an investigation where there has been no testimony—

THE COURT: That may be true, but under the indictment, you read the indictment and you see that it is a question of aiding and abetting and a question of being involved in a conspiracy.

MR. BOUSE: No question about it and if the tap revealed his being involved in the conspiracy, and if the tap gave evidence of that crime that he was involved in, there would be no question that this would not be a good argument, but the tap doesn't reveal that.

THE COURT: How do you know? I haven't even heard the tap, have you?

MR. BOUSE: I have heard one of them and I only know—

THE COURT: I don't know how you heard them, I haven't even heard the tap myself.

MR. BOUSE: Mr. Doolittle played one for me.

THE COURT: I see.

MR. BOUSE: But from the prosecution I can only glean that this is not a tap in furtherance of a conspiracy, but an alleged admission of one and of course that is [H 49] subject to interpretation too, but without getting into the substance of the tap, we have an ex post facto type of tap waged against a defendant who was not a party to the order in the first place.

THE COURT: Well, I don't think that means anything, Mr. Bouse.

MR. BOUSE: Well, how then, if you want to apply the test of sufficiency, sufficiency of the papers and the testimony and if you want to apply that test, that there is reasonable grounds to believe he was committing a crime—

THE COURT: Are you saying this legally? Assume arguendo that there is no question about reasonable cause for wiretap of a particular phone and you say that assume that a telephone call comes in on that tapped wire and a person who is making the telephone call is right in the midst of a conspiracy and the mere fact that the wiretap or the predicate for the reasonable cause for the wiretap did not mention this person that therefore the wiretap is not any good?

MR. BOUSE: Not exactly. You are close to it. I am saying this:—

THE COURT: I am close to it? I don't know how [H 50] close I can get.

MR. BOUSE: I am saying this: If you want to adopt the McCall ruling as far as sufficiency is concerned where you have to show evidence or some reasonable ground that a crime is being committed and evidence of it can be obtained from a wiretap and you name the people involved, as to a third party, not named, that isn't sufficient.

THE COURT: No, the McCall didn't say what you just said.

MR. BOUSE: Well, that is what I got.

THE COURT: Well now, what you said before, the McCall case said that there has to be some factual statement of the affiant's experience with the informer's reliability and some factual showing of what the informer revealed are basic requirements and they cited in that case the Marshall Case, and there are other similar decisions that the informer's information was tested by independent observations.

Now, that's all part of the McCall Case and that is what it says. It never says that you have to prove the elements of the crime or anything of that nature.

MR. BOUSE: No, I didn't say that. I said if you [H 51] want mentally—I said if you want to obtain a wiretap order as to a third party, not named in it, it becomes a fishing expedition and therefore not under surveillance, not under investigation and there is no crime or suspicion of crime and as to a third party it is insufficient and an order which doesn't name the third party in the first place—

THE COURT: You see, that is where the original affidavit of Mr. Levy, not the supplemental inquiry by the Judge, you see if you read that it has some merit because Mr. Levy's affidavit says that he particularly involved, actively engaged in the investigation of the attempted extortion and conspiracy to commit the crime of extortion and the conspiracy to commit a crime which your petitioner has good and sufficient reason is being committed in

Nassau County and he mentions Salvatore Granello and Dino Conte.

MR. BOUSE: That is a printed form. They are always actively engaged.

THE COURT: What I am saying to answer your question that there was no investigation, obviously there was and that the supplemental, of course, inquiry of the Judge, Judge Spitzer, has always to be read in connection [H 52] with Mr. Levy's affidavit.

I am going to adjourn for a few minutes. I want to check one aspect of the law and I will give you a decision.

* * * *

[H 53] THE COURT: All right, People rest. How about the defendant?

MR. DOOLITTLE: Yes, your Honor.

MR. BOUSE: Defendant rests.

THE COURT: All right, as to your question, just so the record reflects it, there was some argument here about the question of jurisdiction of the County Judge to issue the wiretap.

Let the record reflect that there is no question that we have jurisdiction.

[H 54] Now, I have gone over these exhibits again, Exhibit 1A and 2A and I have reread the McCall decision. I find that there was reasonable grounds for the granting of the wiretap orders as to both of these, 212—LW 4-2523 and also for the telephone numbers 212 CA 6-8509 and 212 CA 6-8854.

You have an exception.

MR. BOUSE: Yes, if your Honor please.

THE COURT: All right, gentlemen, I think now if you get the jury down we can start to pick the jury.

MR. BOUSE: May we have, if your Honor please, a separate ruling as to not only reasonable grounds for the issuance of the order, but you also find that they are admissible against the defendant, Thomas R. Kaiser?

THE COURT: Oh yes, the reasonable ground and also I find—no, I haven't ruled whether they are admissible against him yet, because no foundation has been laid for the wiretap. I am not going to rule on that yet.

MR. BOUSE: No, just to the issuance.

THE COURT: Just to the—
MR. BOUSE: Not to the foundation.
THE COURT: You mean the wiretap proper?
MR. BOUSE: Yes.
[H 55] THE COURT: All I am ruling on is that there existed reasonable cause fo rthe issuance of a wiretap order.
MR. BOUSE: Well, that in effect rules on the admissibility in this trial wherein Kaiser is the only defendant so that your Honor is doing—
THE COURT: I am saying that ultimately they could be admissible providing all the other factors involved in the introduction of the wiretap are properly met.
MR. BOUSE: All right. May the record respectfully—
THE COURT: I am sure you don't want to press me on that, do you?
MR. BOUSE: No, I just want to get an exception to the entire ruling.
THE COURT: Oh, you have it, you have it.

* * * *

[82] AFTERNOON SESSION

(Roll call of jurors; all present.)

* * * *

(Mr. Doolittle opened to the jury on behalf of the People as follows:)

MR. DOOLITTLE: May it please the Court, Mr. Bouse, Mr. Foreman, Mrs. Roberts, gentlemen of the jury, Mr. Alternate Jurors, both of you:

At the outset of every criminal trial, the law imposes a duty on the district attorney to make an opening address and I am sure the Court will admonish you and I will draw to your attention the fact that what I say is not evidence.

The purpose of the opening is similar to opening the covers of a book and seeing the table of contents so that you have some idea of what is to follow and so that you will have some idea as far as a blueprint is concerned

as to what salient points to look for in the presentation of evidence.

Now, again I say that what I say is not evidence, and [83] should Mr. Bouse make an opening address that is not evidence. I merely ask you to listen to the opening, listen to what I tell you the People intend to prove and hold me accountable.

Now, the case is before you, Mrs. Roberts and gentlemen, by reason of the fact that the grand jury of this particular county, Nassau County, has returned an indictment charging this defendant, Thomas R. Kaiser, together with other named defendants, with six specific crimes. I have mentioned the word "blueprint" to you. In effect, this indictment is the blueprint, and the People must establish each and every element contained in this particular blueprint to your satisfaction beyond a reasonable doubt before you may find the defendant guilty.

Now, I am going to read the indictment to you so that you fully understand what the indictment is. You have all agreed that you understand the fact that the only person whom you are to try here is this particular defendant, Thomas R. Kaiser. You have all assured me, of course, that you will listen to all the evidence as it af- [84] fects all of the defendants in determining whether or not this defendant, Thomas R. Kaiser, has committed the particular charges with which he is being charged.

* * * *

[95] Now, Mrs. Roberts and gentlemen, this is the indictment. These are the things that the People have to prove. In substance, one count of conspiracy, to commit these various acts, one count of coercion, two counts of assault in the second degree, one count of attempted extortion and one count of burglary in the second degree.

The reading of this indictment and anything I say at this point is not evidence. This may not be considered by you except as I say a guide as to what this is all about.

I say to you at the outset that the People will prove this, and I draw your attention to this fact, and this is [96] something I want you to look out for during this case, that this case is the case of the People against Thomas R. Kaiser.

I say to you that the People will prove the guilt of Thomas R. Kaiser, beyond any reasonable doubt, that Thomas R. Kaiser together with Granello or Sally Burns and his friend Dino Conte, together with certain unknown persons entered into an agreement, an illegal conspiracy to extort $25,000 and a percentage of the business of Irving Holzman.

We will prove to you that Irving Holzman was a man who had substantial holdings in the juke box business, that in fact he had an extremely lucrative business, and we will prove to you that these defendants, realizing the lucrative business that Irving Holzman had, entered into this agreement wherein by threatening his wife and being part and parcel of a conspiracy and an act wherein the sum of $25,000 was attempted to be extorted from Holzman together with a percentage of his business, we will prove to you that they conducted certain acts, overt acts in furtherance of this conspiracy; that Holzman would [97] not cooperate; that he was not willing to go along with it, and that ultimately because of Holzman's reluctance to just automatically give $25,000 and 25 percent of his business to this conspiracy that when Holzman was away from his home three unknown assailants, the Roes and the Does—or was it four? A group of unknown assailants as part of this conspiracy entered into the home of Irving Holzman and pistol-whipped his wife, broke open the front door.

We will prove to you that this act was adopted by the conspirators and was, in fact, part of the conspiracy; that in fact this breaking in of the home was not really for the purpose of assaulting Mrs. Holzman but it was to assault Mr. Irving Holzman because he, in fact, would not go along with this attempted extortion.

We will prove to you that thereafter Holzman contacted the police and that from that point on the police and the district attorney's office investigated this case, and we will produce for you testimony of an electronic nature, monitored telephone calls, wiretap conversations between various conspirators and the victim, Irving Holz- [98] man, and between various conspirators, more particularly in this case between Conte and this defendant

Thomas R. Kaiser. And we will prove to you not just alone through the testimony of the witness Irving Holzman, not alone just through the testimony of Ruth Holzman, his wife, not just alone through the testimony of Ronald Billing and Delores Billing, his son-in-law and daughter, not just alone through the testimony of detectives, but through independant, dis-interested wiretaps and wiretapped recordings of the actual voices of these defendants. You jurors will actually be present at the time when the extortion and the conspiracy is being fulfilled. You will be present when this defendant, Thomas Kaiser, on a taped conversation—

MR BOUSE: Objection.

THE COURT: Sustained.

MR. DOOLITTLE: You will hear, gentlemen, an admission on a telephone conversation—

MR BOUSE: Objection.

THE COURT: Sustained only as to form. If you just go into the phraseology that you will prove.

MR. DOOLITTLE: We will prove to you that during [99] the course of this conspiracy Mr. Holzman, similar to many victims of conspiracies, was not fuly aware of the existence and the names and identities of all the co-conspirators. We will prove this to you—

MR. BOUSE: Objection.

MR. DOOLITTLE: This is what we intend to prove, your Honor.

MR. BOUSE: Operation of the mind of the witness. He hasn't even been introduced.

THE COURT: I'll sustain that. Go ahead. Sustained.

MR. DOOLITTLE: Well, your Honor—

THE COURT: Sustained. No argument.

MR. DOOLITTLE: Wait, your Honor.

THE COURT: Just a minute.

MR. DOOLITTLE: May I approach the bench?

THE COURT: Did you hear me? No argument. Sustained. I don't want any argument, not one word. That goes for the whole trial. That goes for you, too, Mr. Bouse.

MR. BOUSE: Yes, sir.

[100] THE COURT: You make your objection on the record; nothing else. Not one word in the presence of this jury.

MR. DOOLITTLE: I didn't want to do it in the presence of the jury, your Honor.

THE COURT: Objection sustained. Go ahead.

MR. DOOLITTLE: We will introduce to you a telephone conversation between this defendant and Thomas Kaiser. You will hear this conversation. You will hear the defendant Kaiser himself stating—

MR. BOUSE: Objection.

MR. DOOLITTLE: —and talking—

MR. BOUSE: Objection.

THE COURT: No, I'll overrule that.

MR. BOUSE: He is talking about somebody—

THE COURT: He is not giving the substance.

MR. BOUSE: He is talking about something that may be admitted and he is giving the contents.

THE COURT: Objection overruled. There are no contents at this time. At this point it is overruled.

Go ahead. Don't divulge the conversation. Continue.

[101] MR. BOUSE: I respectfully except.

MR. DOOLITTLE: May we just approach the bench, your Honor, with the stenographer?

THE COURT: No.

MR. DOOLITTLE: In the absence of the jury?

THE COURT: Absolutely not. Go ahead. I will let you have an objection on the record. Go ahead. Continue. Continue.

MR. DOOLITTLE: Your Honor, I can't continue at this point.

THE COURT: Continue.

MR. DOOLITTLE: May I just approach the bench, your Honor, with Mr. Bouse?

THE COURT: Absolutely not. Continue.

For your guidance, Mr. Doolittle, I will allow you to say to the jury exactly what you intend to prove.

MR. DOOLITTLE: That is precisely what I am trying to do, your Honor.

THE COURT: Without giving the substance of any testimony.

MR. DOOLITTLE: We will prove to you, Mrs. Rob-
[102] erts and gentlemen, that this defendant, Thomas Kaiser, together with Conte, Granello and these unknown persons was part and parcel of a conspiracy to extort money and to do the acts contained in the first count.

We will prove to you not by what I say and not only by the testimony of one witness but by the independent wire recording, the tape recordings.

Now, gentlemen, the Court has said I must not specifically tell you what evidence I will put in. I will merely say that I will prove this to you and you hold me accountable for it.

THE COURT: Mr. Doolittle, not verbatim. I will allow you to prove what you intend to prove without quoting the verbatim subject of the testimony—and you know exactly what I am saying.

MR. DOOLITTLE: Judge, I am completely at a loss. That's why I want to approach the bench so we can discuss this, your Honor.

THE COURT: Go ahead. Continue.

MR. DOOLITTLE: I'll need a few minutes to put my thoughts together, your Honor, because I prepared an
[103] opening which I can't follow now.

THE COURT: All right. Go ahead.

MR. DOOLITTLE: We will prove to you, gentlemen, that this defendant, Thomas Kaiser, was not in fact one of the assailants per se of Mr. Holzman.

We will prove to you that he, together with Conte and Granello and the four unknown defendants, acted in concert together with these defendants and with Granello and Conte to the extent that these four unknown assailants entered into the house of Mr. Holzman and pistol whipped Mrs. Holzman looking for Mr. Holzman, as part of this conspiracy.

We will prove that to you not only by the testimony of witnesses but also by independent taped recordings of actual telephone conversations with one of the defendants and with all of the defendants.

We will prove to you that statements were made by this defendant, Thomas R. Kaiser, which you may consider

admissions as to the absolute part and parcel of his participation in this conspiracy.

And you will hear these, gentlemen and Mrs. Roberts.

We will prove to you that this defendant, Thomas Kai-
[104] ser, together with the other defendants Granello, Conte and the four unknown defendants, did in fact act together and in concert and in furtherance of the conspiracy to extort money and a portion of the business of Irving Holzman, and because Irving Holzman would not cooperate, although he did not personally make the telephone call to Sylvia Billing was part and parcel and did act in concert and acted together with the person who in fact did in furtherance of this conspiracy call Sylvia Billing and tell her if her father did not cooperate—Irving Holzman did not cooperate—"Her fucking pregnant belly would be kicked in;" and we will prove to you that this defendant is guilty of that.

And we will prove that to you not alone by the testimony of one witness but by all the proof and by the independent taped evidence that will be before you.

And we will prove to you that the crime of burglary was committed by these four defendants themselves, the ones who actually broke into the home, but in complicity with and acting in concert with Granello and Conte and
[105] in furtherance of this conspiracy to extort money and a percentage of the business of Irving Holzman. We will prove to you that this defendant was guilty of that beyond any reasonable doubt even though, in fact, he was not there. And we will prove that to you not alone by the testimony of Mrs. Holzman, not alone by the testimony of Irving Holzman but by other evidence, by testimony and evidence of actual conversations of the conspirators. And we will prove to you that there, in fact, was a conspiracy and that Thomas Kaiser was as much a part of this conspiracy as Dino Conte, as Salvatore Granello, as John Doe, Richard Roe, John Roe and Daniel Roe, and we will prove it, gentlemen, not by what I say and not alone by what Irving Holzman says but by evidence that irrevocably will prove that in fact he was an intricate part of this conspiracy and a conspirator in each and every one of these counts.

[106] Now, gentlemen and Mrs. Roberts, let me say this: that during this trial it may appear that other people other than Thomas Kaiser are on trial. Do not under any circumstances lose sight of the fact that Thomas Kaiser is on trial in this case and that he is the one that is being charged, and that's why I say the People are not counting on the testimony of one witness or two witnesses. We are counting on proof, objective proof of all these acts. I ask you merely to keep an open mind at the outset, and remember what I say is not evidence, what Mr. Bouse says is not evidence. Listen to this case with a completely open mind, and I say, make me responsible to prove to you what I am saying.

In the question of proof, I will say this to you: The proof will go on and show acts of Conte and Granello, and the proof may indicate that these acts go on. There will be more testimony about Granello and Conte than there will be about Kaiser. I said that to you initially. There will be more acts of Conte and Granello proven than there will be of Kaiser, and I will prove to you that Holzman was not even aware of Kaiser's implication and [107] that the first time he became aware of it was after the conspiracy.

MR. BOUSE: Objection.

MR. DOOLITTLE: We will prove this to you.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

MR. DOOLITTLE: That after the conspiracy was completed, that after the conspiracy had ceased it was then as a result of a conversation that this defendant had with Conte that Holzman then became and law enforcement, and the District Attorney and the grand jury then became aware of his part in this conspiracy.

MR. BOUSE: Objection—

MR. DOOLITTLE: And we will prove to you—

MR. BOUSE: —as to who became aware of what.

THE COURT: No, overruled.

MR. BOUSE: I respectfully except.

THE COURT: That's what he's going to prove.

MR. DOOLITTLE: So listen very closely, gentlemen.

We will prove to you the conspiracy by the acts of this defendant, through the acts of Conte and Granello. We [108] will prove to you that this defendant in fact is equally guilty of this conspiracy with Granello and Conte by virtue of a conversation which we say to you, and we believe you will agree, is an absolute, complete admission of his part and parcel in this conspiracy.

I ask you now to listen with an open mind again and I plead with you, do not be led down the primrose path to the extent that you get caught on some collateral issue to the extent that you lose sight of the fact that the issue here before you is, did in fact Thomas Kaiser commit these acts?

Mr. Foreman, Mrs. Roberts, gentlemen, gentlemen alternate jurors, I will have an opportunity at the end of the entire case when all the evidence is in to address you again, to give you the People's summation or the People's statement through me, as to what inferences naturally and logically flow from the evidence. I only ask you to listen now attentively, keep an open mind, form no judgments either by anything I say or anything that Mr. Bouse might say until all the testimony is in and until you get to the point where then you, and you alone, have to judge the guilt or innocence of only one person, this [109] defendant, Thomas Kaiser. Thank you very much for your attention.

MR. BOUSE: Your Honor, at this time the defendant has motions with respect to the opening of the District Attorney which—

THE COURT: Before you get to that, do you wish to open or do you not wish to open?

MR. BOUSE: I would like to make a motion at this time.

THE COURT: Premature. Do you wish to open or not wish to open?

MR. BOUSE: I wish to open but I wish to make the motions prior to the opening.

THE COURT: Denied.

MR. BOUSE: I respectfully except.

[Mr. Bouse opened to the jury on behalf of the defendant as follows:]

MR. BOUSE: May it please your Honor, Mr. Doolittle, Mr. Foreman, Mrs. Roberts: You have heard the remarks of Mr. Doolittle, what he intends to prove or what he thinks he is going to prove, and as he so rightly says, nothing he says is evidence, nothing I say is evi-
[110] dence, and in fact, you heard it before, nothing his Honor says is evidence, only what you hear from the mouth or the mouths of the witnesses constitutes evidence, and of course whatever exhibits may be admitted into evidence.

There is no question that Mr. Doolittle knows less now about this case than you will at its conclusion. There is no question about that.

The defendant, Thomas Kaiser, is the only defendant on trial. You have heard that time and time again and you can see for yourself that he is, in fact, the only defendant on trial.

The evidence will show that he is a manager or was a manager of a children's amusement park.

The evidence will further show that he has become the sideline victim of a falling out of two operators. You may well call them two racketeers at the end of this trial. The principal parties in this trial are Messrs. Granello and Holzman. There is no question about that. Those are the two antagonists.

The evidence will show that Mr. Granello knew Mr. Holzman in 1958, met him in 1957. He along with Rocky Graziano formed a triumvirate at that time, in 1958. Thomas Kaiser was not known by any of them nor did
[111] he know them.

Now the evidence will further show that the defendant Thomas Kaiser knew Mr. Holzman for approximately one and a half years before the incidents, as outlined in the indictment, took place, one and a half years that he was a friend of Mr. Holzman; that he did certain duties for Mr. Holzman, among others, collection work on notes held by Mr. Holzman and that Mr. Holzman had promised to set him up in business. I am talking about the defendant, Thomas Kaiser. Consider that when you consider motive for what the defendant is charged with doing.

Now, the evidence will further show that the defendant didn't meet Sally Burns Granello until approximately one month before the incidents as described in this indictment. He was introduced by a boyhood friend named Dino Conte, Sally Burns Granello, this is one month before.

The evidence will further show, and you won't have to speculate on this, that Sally Burns Granello wanted to be Holzman's partner, he felt it was due him, he felt it was owed him.

The evidence will show that on numerous occasions [112] Granello claimed, and Holzman admitted, that Holzman owed his life to Granello because of certain testimony that Mr. Holzman gave in 1960, on a jukebox trial. There was no dispute about a debt owing.

The evidence will also show that Sally Burns Granello held four $25,000 notes of Mr. Holzman, $100,000 total, and now Mr. Granello wants to become a partner in Mr. Holzman's jukebox business.

The evidence will show that after being stalled off for a period of time, Mr. Holzman said, "Look, I'd like you in, Sally, but my partners don't." This is where we have the defendant coming in. Dino Conte, already a friend of Sally Burns Granello, the evidence will show he communicated with the defendant and said, "Look, you know Mr. Holzman, you know his partners, find out who his partners are so Granello can go directly to the partners and find out why he can't get in as a partner."

The defendant, Thomas R. Kaiser, helping his old friend, in a position to help, undertakes to get the information. These are the phone calls you are going to hear, if you her them. In the meantime there is a falling [113] out of thieves, Granello is tired of being stalled, Holzman is worried about the $100,000 in notes, Granello accuses Holzman of using them, accuses him of stealing an invention of his, pertaining to juke boxes.

The evidence will also show that at this particular time there is a $6,000,000 lawsuit by Granello against Holzman for the theft of this invention.

The evidence will show vague threats by Granello against Holzman. No question about that.

The evidence will also show that there were conversations between the defendant and Conte; that the situation was handled badly. Of course it was handled badly. The defendant, the evidence will show, was trying to gather information so there can be some kind of a business deal and on the other hand, Granello was going over on his own. The evidence will show that it culminated an outright dispute, fight, call it what you will, between Granello and Holzman.

The evidence will further show that Holzman went through the area, complaining of being victimized by [114] Granello, and that in the conversations between Conte and Kaiser, they jokingly referred to "Well, you can't have a deal here with this kind of action. We got to find another victim."

Listen to the conversations and listen to the tenure of the conversations and the attitude that accompanies them, and always look for motive. There is no question that Mr. Doolittle doesn't have to prove motive but you can consider the lack of it. Listen also to the testimony as you hear it—and it will be produced—of the personal relationship of the District Attorney of this county and Irving Holzman and the financial dealings between the Deputy Assistant District Attorney of this county and Irving Holzman and the relationship between the firm of Cahn and Mackston, half of which is the District Attorney of this county, and Irving Holzman.

The evidence will show that the defendant didn't conspire to do anything; that there was no conspiracy involving him, if there was any conspiracy at all; that he didn't threaten anyone or conspire to threaten anyone; that he was to receive no money or nothing, and people don't work that way these days; that he assaulted no [115] one, conspired to assault no one, and guide yourselves against being swept up in the emotion that can accompany bad language, undercurrents, atmosphere.

The burglary and the assault that Mr. Doolittle speaks of could well have happened. We don't know. If we were conspirators, would we know?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

MR. DOOLITTLE: That's summation.

THE COURT: No summation. Come on, Mr. Bouse. Continue on properly.

MR. BOUSE: Keep your mind open, Mrs. Roberts and gentlemen. You are not going to hear—if you hear anything about the defendant in the beginning you are not going to hear anything good. Please don't close your mind to the rest of the testimony. Certainly, don't close your mind to cross-examination after you hear the direct examination of any particular witness. In other words, keep your eye on the ball and see where it lands, see who it points at, see what it says, watch out for the traps, the atmosphere, the undercurrents, the emotions.

The testimony will show, when we are through, that [116] the District Attorney's Office of this county was used by a single citizen of this county to rid himself of a $100,000 debt. That's what the testimony will show when we are through.

Now, you are going to hear Mr. Holzman. The testimony will show that he was a felon, perjurer, an adulterer, committed frauds against the United States Government, procured abortions, and the testimony will further show that Thomas R. Kaiser never got a parking ticket. This is the criminal that is being tried on the word of Irving Holzman. This is the man you are trying.

Now, at the end, Mrs. Roberts, and gentlemen, I don't think there will be any question that you will have much more than a reasonable doubt. You will be convinced of this defendant's innocence beyond any doubt. And, perhaps, during this trial and during the deliberations you will probably wonder as to how your tax dollars are being spent.

Thank you very much.

* * * *

[130] MR. DOOLITTLE: Your Honor, before I proceed with any witnesses, I'd like to have certain exhibits marked for identification.

THE COURT: Yes, do that.

* * * *

[131] MR. DOOLITTLE: I would like to have reel described as 1290-a, reel 1, approximate footage 179 feet to approximately 202 feet marked People's 1 for Identification.

(Reel referred to received and marked People's Exhibit 1 for Identification.)

MR. DOOLITTLE: I would like to have reel described as 989-c, reel 1, approximate footage 67 feet to approximately 186 feet marked People's Exhibit 2 for Identification.

(Reel referred to marked People's Exhibit 2 for Identification.)

MR. DOOLITTLE: I would like to have reel described as 1290-a reel 3, approximate footage is 322 feet to approximately 364 feet, and approximately 364 feet to approximately 424 feet marked People's Exhibit 3 for [132] Identification.

(Reel referred to marked People's Exhibit 3 for Identification.)

MR. DOOLITTLE: Might I correct, your Honor, the description of feet. Actually that is meter reading. When I say "feet," I mean meter reading. It really isn't feet, I don't think.

THE COURT: All right.

MR. DOOLITTLE: May the offer be amended to the extent of feet I meant meter readings?

THE COURT: Yes.

MR. DOOLITTLE: I would like to have tape reel described as 1290-a, reel 6, meter reading approximately 467 to 500 marked People's Exhibit 4 for Identification.

(Reel referred to marked People's Exhibit 4 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as 9897-c, reel 2, meter reading approximately 4 to approximately meter reading 67 marked People's Exhibit 5 for Identification.

THE COURT: Was that 9897-c?

MR. DOOLITTLE: 9897-c, reel 2, meter reading ap-
[133] proximately 4 to approximately meter reading 67, be that feet or whatever it is, that's what it reads on the meter, marked People's Exhibit 5 for Identification.

(Reel referred to marked People's Exhibit 5 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as 1290-a, reel 7, specifically meter readings approximately 62 to approximately 84 and meter readings approximately 270 to meter readings approximately 342 marked People's Exhibit 6 for Identification.

(Reel referred to marked People's Exhibit 6 for Identification.)

MR. DOOLITTLE: I would like to have tape recording described as 583 10th Avenue, New York City, Holzman and Sally Burns bug, Holzman's office, the entire tape —no, I'm sorry, meter reading approximately 40 to meter reading approximately 429 marked People's Exhibit 7 for Identification.

(Reel referred to marked People's Exhibit 7 for Identification.)

[134] MR. DOOLITTLE: I would like to have reel described as 1290-a, reel 8,—if I may show this to Mr. Bouse—1290-a, reel 8, approximately meter reading 14 to approximately 48—wait a minute—yes, it is, approximately meter reading 14 to approximately 48 marked People's Exhibit 8 for Identification.

(Reel referred to marked People's Exhibit 8 for Identification.)

MR. DOOLITTLE: I ask that tape reel described as RCA-5, reel 1, meter readings approximately 137 to meter reading 306 and meter reading 408 to approximately 818 marked People's Exhibit 9 for Identification.

(Reel referred to marked People's Exhibit 9 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as BCO 4b, reel 07—reel 7—reel 07, meter reading approximately 202 to approximately meter reading 223 marked People's Exhibit 10 for Identification.

(Reel referred to marked People's Exhibit 10 for Identification.)

[135] MR. DOOLITTLE: At this time, your Honor, I offer into evidence or I ask the Court to take judicial notice—I withdraw that.

I will ask the Court to take judicial notice and apprise this jury of the fact that a court order dated July 1, 1964, was executed and signed by Judge Harold Spitzer, County Judge of the County of Nassau, permitting the interception of all telephone communications at No. 212-LW-4-2523, the telephone of the Headline Bar at 255 West 43rd Street, New York County, New York; that said order was signed and to be effective as of July 1, 1964, and was to be effective and in force up to or until August 29, 1964. Rather than offer it in evidence, your Honor, I ask the Court to take judicial notice and so advise this jury that telephone interceptions of that particular number of the Headline Bar were in fact legal telephone interceptions pursuant to a court order.

MR. BOUSE: Your Honor, the defendant has no objection except that the record should note that at the date has been changed in ink from June 30, 1964, to July 1, [136] 1964.

THE COURT: All right, with that exception. All right.

MR. DOOLITTLE: And will the Court so apprise this jury that all such telephone interceptions during that period were valid and legal pursuant to this court order.

THE COURT: The only problem with that is that—

MR. DOOLITTLE: Subject to the—

THE COURT: I won't even say subject to connection. All I will tell the jury at this time is—let me see it. (Handed to Court)

First of all, all I will say is that at this time that an order dated July 1, 1964, was signed by a former Judge

of Nassau County, one Harold Spitzer, in relation to authorization to tap a telephone instrument bearing No. 212-LW-4-2523, which is located at 255 West 43rd Street, New York. That's all I will tell the jury.

Now, that must be marked anyway. I want it marked anyway. Mark it.

MR. DOOLITTLE: I will mark it People's Exhibit 11 [137] for Identification.

(Order referred to marked People's Exhibit 11 for Identification.)

MR. DOOLITTLE: Your Honor, I am only having the order itself, not the accompanying papers, marked for identification.

THE COURT: That's all that has been offered is the order.

MR. DOOLITTLE: Right.

I ask the Court to take judicial notice that a court order was signed on July 1, 1964, by Harold M. Spitzer, County Judge of Nassau County, ordering and permitting the interception of all telephone communications on Nos. 212-CA-8509 and CA-6-8854, the telephone numbers of Patrissy's Restaurant, 98 Kenmare Street, New York County, New York, and that said order premitted the interception of all telephone conversations from the period of the date of the signing of the order on July 1, 1964, and that said order was effective and in force until the 29th day of August, 1964, making all interceptions and recordings of telephone communications from those numbers legal and valid pursuant to this order.

[138] THE COURT: All right, strike out "legal," and "valid," and all I will say is that—and I will say as I said before strike out the "legal" and "valid" part of it by counsel. But, I will tell you this: that there was permitted on July 1, 1964, by authorization of a former Judge of this court, Harold M. Spitzer, the authority to tap a telephone instrument which bore a telephone number 212-CA-6-8509 and telephone number CA-6-8854, that telephone instrument was located at 98 Kenmare Street, New York.

MR. BOUSE: Your Honor, the defendant—

THE COURT: Just a minute now. And that order was effective and was in force until the 29th day of August, 1964.

Now, what did you want to say?

MR. BOUSE: The defendant has no objection, your Honor, except as in the other order the record should show that the date was erased from June 20th and inserted was July 1, 1964.

THE COURT: Yes, it will so show.

All right, mark it. That will be People's No. 12 for Identification.

[139] MR. DOOLITTLE: That would be the order, only the order itself; right?

THE COUR8: Right.

(Order referred to marked People's Exhibit 12 for Identification.)

MR. DOOLITTLE: The People call Mr. John Donovan.

JOHN DONOVAN, 881 East 39th Street, Brooklyn, New York, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Donovan, we have a lot of competition with the fans going so if you will talk right into that microphone everybody will be able to hear you.

By whom are you employed, Mr. Donovan?

A I am employed by the New York Telephone Company.

Q For how long have you been employed by the New York Telephone Company?

A I have been with them for about 21 years.

[140] Q Can you tell me the various positions you have filled for the New York Telephone Company? What position do you hold now?

A At the present time I am the internal auditor for them. Prior to that I worked for the special agent as an investigator. I was installation repair foreman and installer and repair man.

Q Now, pursuant to a request of the district attorney's office—I will withdraw that.

Are you familiar with the records kept in the regular course of business by the telephone company?

A I am.

Q And are you familiar with the records kept in regard to subscribers, subscribers' telephone numbers?

A I am.

Q Are you famiilar with the pairs and cables and binding posts, as to the procedure in that respect as to telephone numbers?

A I am.

Q Now, pursuant to the request of the district attorney's office did you bring with you the records of the telephone company as to the subscriber's name and all records [141] concerning the subscriber's name and location and type of service for code 212 LW-4-2453?

MR. BOUSE: If your Honor please, I object to this testimony at this particular time as being incompetent, irrelevant and immaterial; no foundation having been laid to show where we are going at this particular stage with regard to this particular testimony.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

Q Did you get my question, Mr. Donovan?

A I do have the records for LW-4-2523.

Q And what do the records of the telephone company indicate in respect to what type of telephone that is and where that telephone is located and in whose name that is subscribed to?

A The subscriber's name is the Headline Bar, the address is 255 West 43rd Street. It is a restaurant. They have message rate service. They have one extension and two portable phones and two jacks.

Q Now let me ask you this, sir: You have been with [142] the telephone company for 20 years and you have been in various positions that you have worked in.

Assume, sir, with your experience and your knowledge of the telephone company, that a wiretap was to be placed on that particular number. Would you tell us where that wiretap would be placed and how, in what manner it would be placed and what procedure as to how someone would ascertain the manner in which to put a wiretap—

MR. BOUSE: I object to that. It would be preferable to say where it was placed.

THE COURT: Just a minute. I will entertain your objection at this time to hear what you have to say but I am not going to let you say it in the presence of this jury. But, I will give you this one opportunity because obviously I want to hear what you have to say which relates to all of this.

MR. DOOLITTLE: I will withdraw the question.

THE COURT: I beg your pardon?

MR. DOOLITTLE: I will withdraw that question and ask another question.

THE COURT: All right.

Q Can you tell me, sir, do your records indicate what [143] pair and cable number apply to that particular number?

A Yes, sir, they do.

Q Will you tell me, sir, what is a pair and what is a cable?

A A pair are the two wires that conduct the conversations or permit the telephone number to be extended from the central office to the address of the subscriber. There are two wires that go from the position of the telephone into our central office.

The cable is a lead sheath group of wires that are made up of these pairs that carry many telephones from the vicinity or general location into the telephone central office.

Q In other words, the pairs ultimately leave the cable, is that correct, sir?

A Yes, sir, they do.

Q Do your records indicate at what place the pair leaves the cable?

A Yes, sir, it does.

Q Will you tell us where the pair leaves the cable if your records so indicate, sir.

[144] A In the case of LW-4-2523, the terminal address for the cable is 680 to 686 8th Avenue, in the basement of that building.

Q I see. Now, to intercept a telephone conversation on No. LW-4-2523, how would you do it from that location?

A If you went to that location and were able to identify the pair that line number was working on and attached a recorder or any listening device to that pair, you could hear the conversation.

THE COURT: How would you do that?

MR. DOOLITTLE: I am going to ask that.

Q How would you identify the particular pair and the particular cable. sir?

A By counting. You either would have to know the cable count in that terminal or you would have to know the binding post that that telephone number terminated at. They are both the same thing.

Q When you talk about binding post, specifically what do you mean by binding post?

A There are various sizes of terminal boxes—eleven pair, sixteen pair, twenty-six pair, and when I speak of [145] binding post I am talking of a sequential count starting at 1, 2 or whatever the number of terminals there are in that box.

When I speak or a telephone man speaks of a cable pair he speaks of the identity of that individual pair both in the central office and at that terminal, and the cable count is identified also for the box. Pairs 16 to 36 may terminate in one box. If you are counting cable pairs, you count 16 to 36.

Q Now, in this particular location to get to cable 517 pair 331, would there be any indication on the box showing where that particular pair and particular cable would be?

A Yes. Generally, it is stenciled on the cable box itself, the count.

Q I see. And should you intercept, should you tap onto those wires at that point in that basement, you would intercept telephone conversations going to the number LW-4-2453?

A 2523.

Q 2523, I'm sorry. Now, do your records indicate, sir, whether or not in fact a court order was presented [146] to the telephone company to permit the interception of telephone calls at that number LW-4-2523?

A No, sir, I do not have any record of that.

Q All right. Now let me ask you this, sir: Do you have with you the telephone company records with respect to CA-6-8854, that would be code 212, New York City.

A I do.

Q And do those records indicate a subscriber's name, address and type of service?

A It does.

Q Will you tell us what that is, sir.

A Patrissy's Restaurant at 98 Kenmare Street. It is a coin machine.

Q And do your records reflect a pair cable number and where these pair cables terminate?

A It does.

Q Will you tell us what your records indicate with regard to this.

A Pair 120, cable 3719, binding post 20, in the basement of 185 Mulberry Street.

Q And to intercept telephone conversations on that [147] particular telephone, if you tapped in wires at that location at 185 Mulberry Street on pair 120, cable 3719, you would be able to hear the conversation?

A You would hear the conversation associated with the telephone number.

Q If you attached a recording device to that and it was operating, you would record?

A Yes.

Q And, of course,—the same would be true, of course, of the previous number with regard to an attachment of a recording device if it is operating?

A Correct.

Q Will you tell me, sir, what the records of the telephone company reflect with respect to the subscriber's name and address and cable number and where they make their appearance of CA-6-8509, sir.

A CA-6-8509 is also Patrissy's Restaurant at 98 Kenmare and it is a coin machine. It is pair 167, cable 3719, binding post 43, and located at 187 to 189 Mulberry.

Q I see. Now, should you tap onto pair 167, cable 3719 at that location, 187-189 Mulberry Street, would you be able to intercept and overhear a conversation com-
[148] ing into that telephone number CA-6-8509?

A You would.

Q And should you put an operating recording device on that, would you be able to record the telephone conversations?

A You would.

THE COURT: Would you hear voices going out besides coming in?

THE WITNESS: In and out, sir.

Q You would record all telephone conversations, incoming and outgoing; is that correct, sir?

A That's correct.

Q Would you also be able to hear the dial tone?

A You would if you were listening with a listening device.

Q And if you were recording, you would be able to record the dial tone?

A Yes.

Q Incoming calls—would you hear the ring ring before the people answered the phone?

A You would.

Q Fine. If you were listening and recording with an
[149] operating recording machine you would record that; right, sir?

A You would.

Q Incidentally, would you tell us, please, what they mean by a drop line.

A By a drop line it is the connection that the telephone installer makes between the cable pair at the ter-

mination of the cable and the instrument itself or where it enters the house.

Q And is a drop line also a name for the line that you might use to tap into a phone to intercept a telephone call?

A Yes.

Q Mr. Donovan, I am not sure, but did you give me the pair and cable number and binding post of the Headline Bar? I think you did. Do you have it?

THE COURT: I have it, but let him repeat it so there will be no question.

A The pair and cable and binding post for the Headline Bar LW-4-2523 is pair 331, cable 8517, binding post 31, located at 680 to 686 Eighth Avenue, in the basement.

MR. DOOLITTLE: I have no further questions, your [150] Honor. But, pursuant to the rule of People against Rosario, I will present to Mr. Bouse the grand jury testimony of Mr. John Donovan, sworn to before the grand jury of the County of Nassau on July 16, 1964, pages 73 to 78, and page 81.

MR. BOUSE: May I have an opportunity, your Honor, to peruse the minutes?

THE COURT: Yes. Let the record indicate that the district attorney has turned over to defense counsel the grand jury testimony of this witness.

BY MR. DOOLITTLE:

Q Let me ask you one further question, sir: You say the terminal point in the Headline Bar is at 185 Mulberry Street. Is that correct?

A The terminal point for the Headline Bar is at 680 to 686 8th Avenue, in the basement.

Q And the one for Patrissy's Restaurant is at 185 Mulberry Street?

A That is correct—in the case of CA-6-8854. In the case of CA-6-8509, the address is 187 to 189 Mulberry.

Q Now, I think you have told us that to intercept or record telephone conversations in any one of those numbers if you hit the right pair and cable and attach two [151] wires to it or a drop line, you would be able to intercept conversations. Is that correct?

A That's correct.

Q That, of course, does not mean you have to stay in the particular location of the terminal to record or to intercept. Am I correct?

A No, sir.

Q You could bring long wires and go a couple of blocks away and intercept. Is that correct?

A That is correct.

MR. DOOLITTLE: All right, that's all.

CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. Donovan, this was about two years ago that you were called upon to perform this function on behalf of the Nassau County district attorney's office?

A No, sir, I was not called upon to do it.

Q Did you have any contact with the Nassau County district attorney's office during the period July or June, 1964?

A No, sir, I did not.

Q No direct contact. Would you say that within the [152] past few days is the first contact that you had with the Nassau County district attorney's office?

A Yes, sir, up until my contact with them for the grand jury testimony.

Q Yes. You testified before the grand jury?

A That is correct.

Q Would you say that was your first contact since July of 1964 with the district attorney's office?

A Yes, sir, within the last couple of days.

Q Do you know of your own knowledge who in your office might have had personal contact prior to your appearance before the grand jury?

A Yes, sir, I do.

Q And who would that be?

A It would have been the security director's office in Manhattan.

Q Do you know by name the person involved that would most probably be contacted?

A These generally come in the form of a subpoena asking for information concerning these passing cables. There is no particular one that handles the contact.

Q Your records, for instance, wouldn't show how many taps per year were made by the Nassau County.
[153] district attorney's office, would they?

A No, sir.

Q And you wouldn't know of your own knowledge how many?

A No, sir, I would not.

Q Now, can you tell from the records you have before you, Mr. Donovan, how many numbers of reels were used in the particular investigation that Mr. Doolittle has been referring to in his questioning?

A No, sir, I do not.

Q Your records would not indicate that either?

A We have no contact. We don't do any of this work. We just surrender the information under the subpoena.

Q In other words, your function is merely to ascertain the lines involved, set up the tap?

A No, sir.

Q What is your function? You ascertain the lines involved?

A We tell them the pair and cable number and that is it.

Q In other words, your function is strictly informative?

[154] A I wouldn't say informative. We provide this information under a subpoena and under no other condition.

Q I mean it is informative. You don't do anything physically.

A No, sir.

Q Anything physically to assist in the investigation.

A No, sir, we do not.

Q Now, you have been some twenty years with the telephone company I understand, Mr. Donovan.

A That is correct.

Q And part of that time you were a special agent in investigation?

A I was.

Q So that you have done a lot of these taps yourself personally?

A No, sir, I have not.

Q Have you ever during the course of your duties with the New York Telephone Company been the recipient of intercepted conversations?

A In the course of my duties, yes, I have.

Q And as an expert as far as telephones are con-
[155] cerned and investigations are concerned, would you say that a percentage of the vocal quality is lost on an intercepted telephone conversation?

A Under some conditions, yes, and under some conditions, no.

Q Would you not say that in all conversations the vocal quality wouldn't be the same as a face-to-face confrontation or conversation?

A Yes. In any telephone conversation that is true.

Q Could you give us this: The average estimate of vocal quality that would be lost on an intercepted telephone conversation?

A No, sir, I could not.

Q Well, could you roughly estimate it to be fifty per cent of vocal quality lost?

A No, it would not be fifty per cent.

Q You would not say it was fifty per cent?

A No, sir.

Q Would you say it would be 30 per cent lost?

A I would say less than that.

Q Even 25 per cent loss?

[156] A Probably less than that.

Q Would you say this: that you would get an amount of a vocal quality loss so that you may not be able to determine mirth or chuckling on the part of one or both of the users of the telephone?

MR. DOOLITTLE: Objection. It is highly speculative.

THE COURT: Sustained.

Q In the course of your investigation—

THE COURT: Only as to form. Sustained as to form.

MR. BOUSE: Oh. I didn't hear that, sir.

Q Would you say this: that in your interception of a telephone conversation you would not get everything from the conversation that might have been intended by the two people speaking to each other?

MR. DOOLITTLE: Objection, your Honor.

How can he testify what people intend by a telephone conversation?

THE COURT: No. I will sustain it as to form.

Let me ask you a question, Mr. Donovan. Mr. Bouse posed a question to you and your answer—you started but I don't think you finished it—with respect to a loss [157] that you were referring to, on a transmitted conversation over these wires it would be the same whether it is a wiretap or ordinary telephone. Is that correct?

THE WITNESS: That is correct.

THE COURT: So it would be the same if I were in my home and picked it up and spoke to somebody else, the same loss would be there as you would have in the wiretap?

THE WITNESS: Right.

THE COURT: And that is what you wanted to say?

THE WITNESS: Right.

THE COURT: Did you get that, Mr. Bouse?

MR. BOUSE: I didn't hear it too well, your Honor.

THE COURT: You may inquire.

BY MR. BOUSE:

Q Let me put it this way, Mr. Donovan. Would you say that in the interception of a conversation with the loss that you referred to which might be about 25 per cent, you might not hear a snicker or some other vocal indication of mirth or amusement?

MR. DOOLITTLE: Objection.

THE COURT: Sustained as to form.

[158] Q Let me ask you, Mr. Donovan—

THE COURT: Sit down, Mr. Doolittle.

MR. DOOLITTLE: I am anticipating it is going to be the same question.

THE COURT: Relax.

Q In your investigation wouldn't you say that a reel or a conversation taken out of context might be as misleading as a word or sentence taken out of context ?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: See if he can answer that question.

A Sure, because it is exactly the same. Anything that is taken out of context is different than the intent whether it is written, spoken or overheard.

THE COURT: He got his answer. Now strike it all out. Disregard it. Next question.

Q Would you say that a conversation, an entire conversation taken out of context could be as misleading as a sentence or a word taken out of context?

MR. DOOLITTLE: I object.

THE COURT: Sustained.

Q Well, if you take a particular reel or a conversation out of context, you could get the wrong meaning if you [159] didn't have all the preceding reels, wouldn't you?

MR. DOOLITTLE: I object.

THE COURT: Don't answer. Sustained.

Q Now will you tell us this, Mr. Donovan: When you were investigating for the New York Telephone Company can you give us the type of investigations they were?

A Any investigations were generally of revenue loss or equipment loss or subscriber complaints which were the type of investigations that the special agents office conducted.

Q In other words, your investigation work was strictly intramural, was within the company, for the company, wasn't connected with police work?

A That is correct.

Q Now, when you appeared before the grand jury, Mr. Donovan, did you testify to additional telephone taps that were made other than those asked you by Mr. Doolittle?

A Yes, sir.

Q Do you recall the ones that you testified to before the grand jury?

MR. DOOLITTLE: May I be heard, your Honor?

I am going to object. May we approach the bench? because this is argument of law which I think should [160] not be in the presence of the jury. I think the Court should be apprised of certain things.

* * * *

(A recess was thereupon taken and the following occurred in the absence of the jury:)

THE COURT: Now, Mr. Bouse, before I even hear Mr. Doolittle, the question that you propounded seemed to me on the surface not to have any materiality at all.

MR. BOUSE: Which question?

THE COURT: Because the only purpose this witness testified to was specifically the two pairs or the various pairs that go into the number 212 LW-4-2523 and 212 CA-6-8504 and CA-6-8854. I don't see any materiality to that question unless you tell me what the purpose of it is before I even hear from Mr. Doolittle.

[161] MR. BOUSE: Inasmuch as Mr. Doolittle qualified him as an expert I thought maybe I would get some free expert testimony.

THE COURT: I don't mind you doing that. I think you can inquire but what is the pertinency or materiality of inquiring as to other taps? I don't see any point.

MR. BOUSE: I am not sure I know what question you are referring to.

THE COURT: You asked him whether he made any other taps or testified to other numbers.

MR. BOUSE: Oh, yes.

TH ECOURT: What is the point of that?

MR. BOUSE: So that we will know all of the taps that were gone into, into the investigation.

THE COURT: The only purpose that you have the grand jury testimony is solely on the question of credibility and the purpose of your being given that testimony is to see whether there were any prior inconsistent statements embodied in his testimony before the grand jury, to allow you to test his credibility.

Now, if you are going into something on which he [162] didn't even testify to, I don't see how you can question his credibility. The objection is sustained.

Do you make an objection?

MR. DOOLITTLE: I made an objection.

THE COURT: Now what were you going to say?

MR. DOOLITTLE: I was going to say the only numbers we are concerned with are these numbers.

THE COURT: I don't care that you wanted to get expert advice.

MR. BOUSE: I wasn't going on that, then. May I say this: that if I am allowed to inquire into other taps made, credibility questions may arise.

THE COURT: In what way? I will listen to you.

MR. BOUSE: If he forgot a particular number that he had been questioned or queried about before the grand jury—in other words, one of the numbers—

THE COURT: Assume that what you say is correct, that he had fogotten about what he had testified as to others, that would not affect in any way his credibility as to what he testified to, unless on the theory that perhaps his memory is so impaired he might be confused.

MR. DOOLITTLE: May I make this statement—

[163] THE COURT: Let me hear what he has to say because I don't see the materiality of what he says.

MR. BOUSE: Here I think it becomes material. Mr. Doolittle has discussed in his voir dire and on his opening a witness, Rocky Graziano. I see in the grand jury minutes a particular line listed to Audrey Graziano, on Queens Boulevard, who was the subject of an inquiry before the grand jury, of this witness.

Now, I think inasmuch as the potential, as far as a witness is concerned, is manifest with the name and he has testified before the grand jury with regard to a tap on that number, I think I have a right to inquire further into how many other taps were made and how many people involved in the particular case.

THE COURT: No. I will tell you why on the record. I am not going to allow you to do that. First of all, it is discretionary with me, but I have an added duty and I am not going to permit to be embellished in this record on the question of credibility the interjection of possible taps on other people's phones because I have and you should have and I am sure you wouldn't do it intentionally, [164] but we have a duty to protect people and I am not going to question the credibility to allow into this evidence of possible taps on other phones which may raise an inference by some publication in the newspaper that there might have been some implication of a person who is absolutely innocent, has nothing to do with this case, and by inference or some note in some paper, and I am not going to do that.

I am telling you now, if that is the purpose of your interrogation, don't do it.

MR. BOUSE: No. If your Honor please, may I say this; that the purpose of interrogation is completely consistent with your Honor's feeling that many innocent people have their phones tapped on a fishing expedition type of situation and that a few fish get caught now and then. That is the point of bringing out these additional taps.

THE COURT: I am not going to let any names be interjected here. The sole purpose here is to question the credibility of this witness. I will let you inquire if you want to get some free expert testimony. I will even let you do that providing you phrase the questions properly. [165] I will let you do that, but I tell you now I will not allow you to do the other.

MR. BOUSE: I respectfully except.

* * * *

[166] MR. BOUSE: May the record show a continuing objection with respect to all this testimony, of no foundation being laid, that is, any testimony with regard to wiretapping.

THE COURT: Well, I don't know that I follow your thinking.

MR. BOUSE: There is no proof that a conspiracy has [167] been committed, no proof that the defendant has been involved with anything, and we have wiretaps. We don't know how many.

THE COURT: But there must come a point where you have to make inquiry and this is a point to make.

MR. BOUSE: It will be nice to put Mr. Holzman on the stand and have him testify to the fact that he got hurt, there was an assault, burglary, this and that, and put in the wiretaps, and not put the wiretaps in first.

THE COURT: In other words, you are objecting to the procedure?

MR. BOUSE: Yes.

MR. DOOLITTLE: I appreciate the instructions Mr. Bouse is giving me but I have formulated my own method of proving my case. This witness is not talking about wiretaps. He is talking about pairs and cables.

THE COURT: No, he hasn't said anything. But let me tell you this and I will tell you right now that I am familiar with the general rule and I am familiar with the exceptions and I intend to follow procedure, that I will not [168] allow declarations of co-conspirators which are in the furtherance of a conspiracy unless your presentation of proof is directed primarily to prove the conspiracy first. Now you can tell me and show me a lot of cases that say everything goes in the basket and at the end there is a question of fact that the jury will have to decide whether a conspiracy prima facie has in fact been allowed before the declaration of co-conspirators are admissible, but I want you to present your proof, all the specific acts, all the conversations, so that you can give me prima facie before we go into the declarations of the co-conspirators which are admissible against each other.

MR. DOOLITTLE: May I say that that is physically impossible unless I had three witnesses on the stand at once and all talking together.

THE COURT: Absolutely not.

I will advise you this, Mr. Doolittle, I don't think so. I am familiar with this theory very well but I say that I think that the order of proof for you as well as for the defendant is that you give me that testimony which will give those specific acts and declarations, which would give me prima facie proof of conspiracy. Now if you say it [169] is a physical impossibility, that is one thing.

MR. DOOLITTLE: May I say this: that there are certain bits of proof that I have to submit, subject to connection, and the Court will have to rely on my good faith as an officer of the Court, that in good faith I believe these can be connected.

You will notice that I haven't offered anything in evidence at this point. I cannot. I don't intend to until my foundation is properly laid and I can assure the Court that these tapes will be offered into evidence ultimately, through the witness who can identify the voices, after all the other procedures have been complied with.

THE COURT: After all the testimony from other witnesses.

MR. DOOLITTLE: Absolutely.

THE COURT: You see, because you can readily see for the People and for the defendant we cannot be naive, that after the spoken word has been said, and whether I use the most flowery expressions to wipe out what is indellibly imprinted in the minds of the jury as to whether [170) or not a declaration of the co-conspirator is binding on the co-conspirator because it is in furtherance of a conspiracy, but I will tell them that they cannot take it if the conspiracy hasn't been proved. But what I want you to do is to give me, if you will, in your presentation of proof those facts, those acts, those declarations which will give the Court prima facie conspiracy to help, so I will keep to a minimum the admonition that I have to give to the jury on the reception of declarations of co-conspirators which are in furtherance of the conspiracy before the conspiracy has been proven prima facie. I think I make myself clear, don't I?

MR. DOOLITTLE: I am a little bit lost, Judge.

THE COURT: Where are you lost?

MR. DOOLITTLE: I am lost because I am going to have to prove declaration, which undoubtedly, will be subject to connection.

THE COURT: You cannot do it all.

MR. DOLITTLE: Absolutely. Wherever it is humanly possible, Judge, I will do it.

THE COURT: All right. Now, Mr. Bouse—

MR. BOUSE: I just prefer it be perfectly legal, [171] whether it is humanly possible or not.

THE COURT: Let me tell you, Mr. Bouse, it will be legal.

MR. BOUSE: I am sure of that.

[A recess was thereupon taken.]

[The following occurred in the absence of the jury:]

THE COURT: On the record.

MR. BOUSE: Your Honor, I have a hypothetical question: Assuming that you'd set up a tap similar to the information that you are giving Mr. Doolittle; and assuming you had a listening device and a recorder, and assuming further a loss of vocal quality such as you have testified to, would it be possible that you would fail to hear expressions of mirth in the conversation? Just that.

THE COURT: I will let him answer that.

MR. DOLITTLE: Well, I'm going to object to it.

THE COURT: Well, he's interjecting a question of mirth. He is just asking him whether or not—frankly, you should ask him whether or not could you hear any expression of mirth over the telephone even with the loss [172] loss of vocal quality.

MR. BOUSE: Well, that's the negative. I want to ask him would it be possible—

THE COURT: All right, I will allow it. Come on. Bring in the jury. But I don't want you to go on any fishing expedition. That's the only purpose I'm allowing it.

MR. DOOLITTLE: You will permit me to make my objection for the record?

* * * *

JOHN DONOVAN resumed the stand and testified further as follows:

CROSS-EXAMINATION [continued]

BY MR. BOUSE:

[173] Q Assuming, Mr. Donovan, that the taps were set up in a given situation such as you have described for Mr. Doolittle, and assuming further that you had the assistance of a headset or hearing device, and assuming further that the conversation was being recorded, and assuming further that a 25 percent loss in vocal quality, as far as the conversations were concerned, such as you have testified to, would you say that it was possible not to hear certain expressions of mirth which might be lost in that 25 percent loss of vocal quality?

THE COURT: Objection sustained because you are assuming a set of facts that are not even in evidence.

What he wants to know, Mr. Donovan, assume for the sake of argument that you say there is a loss of vocal quality in some transmission, whether it be an ordinary phone or wiretap, supposing somebody laughs, would you hear it?

THE WITNESS: Yes, sir.

THE COURT: Is that what you want to know?

A Yes.

Q If somebody guffaws, would you hear that?

A Yes.

[174] Q So there is no loss of 25 percent? Is that your testimony?

A I didn't say there was 25 percent loss.

Q Well, there is a percentage loss; didn't you say that?

A Yes.

Q What percentage would you say was lost of the vocal quality? You know there is a loss.

A There is a slight loss, yes, sir.

BY THE COURT:

Q What do you mean by "lost," being technical?

A The quality of my voice as I speak to you now is the tonal quality, the overtones, the harmonics of my voice carefully, exactly reproduced through a telephone, the same as they are not through a radio, the frequency response of any electrical instrument is limited in fidelity by the equipment that the componnts are made of.

Q In other words, the spoken word is there but the up and down, the pitch and variance is not?

A Correct.

THE COURT: All right. O.K.?

MR. BOUSE: Well, just one more question.

BY MR. BOUSE:

[175] Q Is it your testimony, Mr. Donovan, that no expression of mirth would be lost?

A No, sir.

Q That is not your testimony?

A Would you repeat your question, please?

Q Is it your testimony that no expression of mirth would be lost?

MR. DOOLITTLE: I am going to object to that. I mean audible expression.

THE COURT: Well, no.

MR. DOOLITTLE: An expression of mirth might be a smile, your Honor.

THE COURT: Objection sustained.

No more comments. I don't want any more comments out of you the rest of the trial. He is an expert witness. Do you understand the question?

THE WITNESS: Yes, sir.

THE COURT: What is your answer?

THE WITNESS: My answer, that would be anything that is audible would be heard.

Q But in that percentage of loss, wouldn't something that would be audible between two people in a confronta-
[176] tion be liable to be lost on a telephone conversation?

MR. DOOLITTLE: Objection.

THE COURT: Objection overruled.

Can you answer it?

THE WITNESS: No, sir.

THE COURT: The answer is no.

Q So there is no vocal loss?

A There is a tonal quality of your voice.

MR. BOUSE: I have no further questions.

THE COURT: Do you have any other questions?

MR. DOOLITTLE: Yes, sir, I have a few, your Honor, just a few on redirect.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Donovan, the pairing and cables that you told us about, the telephone—you are familiar with the policy of the telephone company in regard to those; am I correct?

A Yes, sir.

Q Do they ever release those pairs and cables to anybody other than an authorized law enforcement agency with a court order?

[177] MR. BOUSE: I will object to that as improper redirect. I didn't touch the cables.

THE COURT: Well, it is technically improper but I'll allow it. He has already testified to it.

What is your answer?

THE WITNESS: They give the pair cable to nobody, but only to the law enforcement agencies, only on a court order.

Q Now one further thing. You talked about the loss of tonal quality, and I just want to clarify this a little bit in my own mind. In effect, what you are saying is there is no such thing as perfect fidelity of voice or a transmission of a voice?

A That's correct.

Q I mean, can be draw the analogy like the old records they used to have record tracks but now they have fidelity; it isn't 100 percent pure fidelity?

A Yes.

Q Is that what you mean by tonal conversation?

A Yes.

Q It is not a volume loss?

A No, sir.

Q Fine. Thank you. Now, if you had 150 people tap-
[178] ping on any one wire, for example, on the LW number that you gave us, would that reduce the volume in any respect on any of those wiretaps or on the ultimate telephone conversation between two people?

A I couldn't say. I have never—I can't visualize 150 taps on a wire.

Q Well, let's take one tap or five or ten taps, even.

A It would be the same.

Q In other words, it would be no volume loss?

A No, sir.

MR. DOOLITTLE: Fine. Thank you very much.

RECROSS-EXAMINATION

BY MR. BOUSE:

Q When you talk, Mr. Donovan, about a tonal loss such as you may have experienced during your investigation, could that lead also to a possible mistaken attitude of one of the speakers?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Objection sustained.

MR. BOUSE: I have no further questions.

I respectfully except to your ruling.

MR. DOOLITTLE: Than you, Mr. Donovan.

[179] [The witness was excused.]

MR. DOOLITTLE: Detective William Beach.

WILLIAM J. BEACH, Detective, Shield 4, Main Office Squad, Nassau County Police Department, Nassau County, New York, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Beach, you are a detective of the Detective Division of the Nassau County Police Department, is that correct?

A Yes, sir, I am.

Q Now, on July 3, 1964, were you attached to the District Attorney's Racket Squad, sir, Rackets Bureau?

A Yes, sir, I was.

Q For how long had you been attached to the District Attorney's Office prior to that time?

A Since 1958, sir.

Q Will you tell me what your duties were in the District Attorney's Rackets Bureau.

[180] My duties were primarily in the wire tapping field.

Q Tell us something of your experience and background in that, will you, please, Detective Beach.

A Well, I have testified before in the District and County Courts and the Grand Jury of Nassau County.

I have had training within the police department and I attended seminars and lectures in Manhattan College on this subject.

Q In regard to interception of telephone calls and wire taps, is that correct, sir?

A Yes, sir.

Q During that time, pursuant to court orders, have you tapped telephone wires?

A I have, sir. Yes, sir.

Q Now, did you have occasion on July 3, 1964 to install a recording device tapping the wires for the Headline Bar, located at 255 West 43rd Street, telephone number, 212-LW 4-2523?

A I did, sir, yes, sir.

Q Will you tell me, did you tap that wire, sir?

A Yes, sir, I did.

Q Did you attach a recording device on to that [181] wire?

A Yes, sir.

MR. BOUSE: If your Honor please, excuse me, may we have a continuing objection to this testimony as no proper foundation having been laid for it.

THE COURT: No, you have an objection.

Q I show you People's Exhibit 11 for Identification and I ask you, sir, whether or not you did it pursuant to that court order.

THE COURT: The answer is yes or no.

A Yes, I did.

Q All right, may I have that, please.

Now, mechanically, sir, will you tell me, Detective Beach, exactly what you did when you tapped a wire recording device or a tape recording device on to this number LW 4-2523 and who was with you?

A Pursuant to information that we had received from the New York Telephone Company, I attached a dropline to pair 331 in the basement of I believe it was 68 Eighth Avenue in New York, and that was in cable 8517, and I then hooked this dropline on to a recording device that I had brought with me, and this was done in the presence of Detective Skuzenski.

[182] Q Did you check to ascertain whether or not that recording device was in operating order?

A Yes, sir, I did.

Q Will you tell me what tests you conducted, sir?

A Well, it's a series, it's conducted with the telephone hand-set to ascertain that the machine starts and stops properly.

Q When you say it starts and stops properly, how exactly does a record machine work when you tap into a wire, will you tell me? Does it continue to run or does it run only when telephone calls are made? How does it work?

A Well, basically these recording devices that we have—

THE COURT: When you say "recording devices," what is it? Any name to it? Tell us what it is.

THE WITNESS: Well, it's basically an ordinary tape recording that anybody can buy in a store, and these are either altered by ourselves or some outside corporation alters them and installs an automatic starting device.

Now this starting device is incorporated into the [183] machine and it is put through on the motor side. In other words, the recording device is put into the 110 circuit, it's a series of relays that hold the 110 circuit from being completed. When the telephone is picked up the line voltage drops, the relay closes, it completes the 110 circuit and the automatic recorder starts and records the conversation coming over that given telephone.

Q. From the layman's standpoint, in other words when a telephone call is made or somebody answers a telephone or when a telephone rings or when there is dialing, that starts the tape revolving and recording, am I correct?

A The minute that the telephone is picked up from the cradle, the telephone receiver, the machine automatically starts and all during the time it will record every conversation, either incoming or outgoing, over that telephone, and when it's set down in the cradle the machine stops and it stays dormant until it's picked up.

Q Then it reactivates and records that?

A Yes.

Q Now, this particular device that you put on pair [184] 331, cable 8157, for the number LW 4-2523, was operating at the time you put it in, is that correct?

A Yes, it was.

Q Who was with you at the time, Detective Beach?

A Detective Skuzenski.

Q Did you see Detective Skuzenski do anything relative to placing any tapes on that machine?

A Detective Skuzenski put the tapes on.

Q Did you see whether or not he broke the seal, whether or not there was a new box or what?

A Yes, sir, it was a new box.

THE COURT: Who was the operator of the device?

THE WITNESS: Pardon me?

THE COURT: Who was the operator of the device or the machine? Who was the operator?

THE WITNESS: I did the installing.

Q Incidentally, Detective Beach, you have done this on many occasions, pursuant to a court order, am I correct, sir?

A Yes, sir, I have.

Q Now, in addition to this, have you also monitored telephone conversations, placed recording devices on a telephone with the consent of the person whose telephone con-
[185] versations you wished to record?

A Yes, sir, I have.

Q And is it the same type of recording machine that operates or records and moves only when the telephone is picked up?

A Yes, sir, it is.

Q So that that type of machine where the telephone conversation is being monitored would not just be constantly going around, am I correct?

A No, sir.

Q Only at such time as telephone calls are made?

A Yes, sir.

Q And when the phones cease to be in progress then the machine stops as I think you said, dormant, until it is used again, is that correct?

A Yes. It does have a manual control. You can run the tape recorder.

Q You can if you want to?

A Yes, sir.

Q You, incidentally, did not remove the tape that you saw Detective Skuzenski put on the recording machine that you tapped into, No. LW 4-2523, did you sir?

A No, sir, I had no further connection with this.

[186] Q This was the end of your function as a police officer in regard to that number?

A Yes, sir.

MR. DOOLITTLE: I have no further questions.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Do you ever recall in your experience, Detective Beach, tapping without a court order?

MR. DOOLITTLE: I have no objection to that question.

A No, sir, never.

Q Never did that?

A No, sir.

MR. DOOLITTLE: For the record, your Honor, Detective Beach testified before the grand jury on July 16, 1964, pages 79 and 80, and accordingly as to the rule of People against Rosario, I will present this to Mr. Bouse, the grand jury testimony.

THE COURT: All right. The record will reveal that the grand jury testimony of this witness is turned over to defense counsel.

Q Now, as I understand it, Detective Beach, somehow or other you with Detective Skuzenski, you went to the [187] basement of this building wherein was the phone LW 4-2523?

A Yes, sir.

Q How did you get into the basement?

A Through one of the side entrances.

Q Did the owner of the building know you had come in or had you contacted him?

A We contacted somebody in the building, sir. I don't know whether he was the owner or what. I believe it was the man behind the desk.

Q Well, were you escorted in or did you just make your entrance?

A Well, we will go in and declare ourselves.

Q No, on this particular occasion.

A Yes, sir, I declared myself. I told him what we were there for.

Q Do you know who it was that you talked to?

A I wouldn't know his name, no, sir.

Q You didn't receive any written authority from him that you could enter the basement and proceed to do this tap?

A No, sir, it was verbal.

Q Now, on what date was this tap performed or this [188] function wherein you set up the recorder? I think you said you installed it and Detective Skuzenski made the tape on the recorder, what was the date?

A That was July 3, 1964, sir.

Q Now, you were aware at that time what investigation was being conducted, is that right?

A I had a vague idea, yes, sir.

Q Well, you knew the people that were being investigated at that time or—

A No, sir, I did not.

Q You didn't know the names of any of the people?

A No, sir.

Q Well, let me ask you this: Did you remain with the tapping device while it would be performing its function?

A I don't follow your question.

Q Well, would you just set up the recorder which is automatic, as you have indicated, and leave or would you remain with the recorder while it seemed to be in activity?

A No, I would set the machine up and then I would leave, sir. I would have no further contact with anybody.

[189] Q Well, then, with regard to this particular basement on July 3, 1964, what would you say was the total time you and Detective Skuzenski spent there with this equipment?

A I would say somewhere in the area of thirty to forty-five minutes.

Q And that time was utilized for the sole purpose of setting up the equipment?

A Yes, sir.

Q Not to listen to conversations?

A No, sir.

Q So that you yourself did not hear any conversation on July 3, 1964?

A No, sir, none whatsoever.

Q Did you perform a similar function on any other phone in connection with this investigation?

A I don't believe so, no, sir.

Q Detective Beach, did you have anything else to do in any way, shape or form with this investigation?

A I don't believe so. No.

Q So that would it be fair to say, from your testimony, that July 3 was the only day that you were concerned with this investigation and you spent something

[190] like forty-five minutes utilizing that time for the setting up of the equipment? That would be the sum total of all the contact you have had with this investigation? Would you say that?

A I believe so, yes.

MR. BOUSE: Thank you, Detective.

I have no further questions.

MR. DOOLITTLE: Just one or two further questions, something I neglected to bring out on direct.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q After you set up this machine and found that it was operating, did you secrete this machine in any way, sir?

A Yes, sir, I did.

Q Will you tell me, did you secure it?

A Yes, sir.

Q Will you tell us how you secreted it and how you secured it?

A It was—the machine was placed in a storeroom in the basement of the building, I believe the number was 680, and after securing and placing it in the storeroom [191] and the dropline was secured to it, the storeroom was locked, placed under lock and key.

Q Did you have a key, sir?

A Yes, sir, we did.

Q Did you ultimately give that key to Detective Skuzenski?

A Yes, sir, at that time Detective Skuzenski took it.

MR. DOOLITTLE: All right, fine. Thank you.

MR. BOUSE: Just one other question.

RECROSS-EXAMINATION

BY MR. BOUSE:

Q Do you know, Detective Beach, whether Detective Skuzenski continued on this particular investigation, the one that you spent forty-five minutes on?

MR. DOOLITTLE: Well, your Honor, I don't know how he would know. I am going to produce Detective Skuzenski.

THE COURT: Overruled.

Do you know?

THE WITNESS: I honestly don't know. I believe I did but I couldn't honestly say.

MR. BOUSE: Thank you, Detective.

[192] I have no further questions.

MR. DOOLITTLE: I have no further questions.

Thank you, Detective Beach.

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[209] CLIFFORD CRAWFORD, Shield 24, Main Office, Police Department, County of Nassau, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Crawford, you are now and you were in 1964 attached to the district attorney's rackets squad; is that correct, sir?

A I was and am.

Q What were your functions as a detective for the rackets squad, sir?

A Detective assigned to the district attorney's rackets [210] squad, investigative officer; and also have done wiretapping installations for the district attorney's office.

Q What has been your experience in wiretapping with the district attorney's office?

A I have been doing the wiretaps for the past five years for the Nassau County district attorney's office. I have gone to seminars. I have gone to Farmingdale Agricultural College to further in electronics.

Q And you have had much practical experience in the field, is that correct?

A I have.

Q Let me ask you this, sir: On July 3, 1964, did you have occasion to install a wiretap at 185 Mulberry Street on the telephones for Patrissy's Restaurant?

A I did.

MR. BOUSE: If your Honor please, may the defendant now have on the record a continuing objection to the order of proof upon which the porsecution is proceeding. There has been no foundation laid for this type of testimony at this particular time.

[211] THE COURT: Well, I would say this: It is not binding on this defendant at all at this time. If and when it is connected, that is a different thing. But, with that admonition, the objection is overruled.

MR. BOUSE: I respectfully except.

MR. DOOLITTLE: At this time, your Honor, before I proceed with Detective Crawford I would like to have People's Exhibits 11 and 12 for Identification marked in evidence.

THE COURT: Show them to Mr. Bouse. These are the court orders. Any objection?

MR. BOUSE: No.

THE COURT: Mark them.

MR. BOUSE: Do I understand that your Honor has taken judicial notice of them?

THE COURT: He has offered them. Do you have any objection?

MR. BOUSE: Oh, I didn't realize that. Of course. The objection would be same as the prior one: upon which the prosecution is proceeding.

THE COURT: Do you have any specific objection to the exhibits? I overruled the objection on the order of [212] proof.

MR. BOUSE: Only as to that those two are out of order; not as to the content or substance or validity but the order they are being put in evidence.

THE COURT: I will overrule that.

MR. BOUSE: I respectfully except.

(People's Exhibits 11 and 12 for Identification now received in evidence and marked People's Exhibits 11 and 12.)

Q Now, the wiretap that you installed at 185 Mulberry Street on July 3, 1965, was that pursuant to People's Exhibit 12 in evidence?

MR. BOUSE: I think that calls for a legal conclusion, your Honor.

MR. DOOLITTLE: It has to be pursuant to that.

THE COURT: Just a minute. Overruled. No colloquy. That's the end of that. Just make an objection. Don't answer him, Mr. Doolittle.

A Yes, this is the order.

Q Fine. Now will you tell me what you did on that [213] particular occasion as far as installing a machine and tapping the Canal 6-8854.

THE COURT: The objection to that question is sustained as to form. Tell us exactly what you did pursuant to that.

MR. DOOLITTLE: That was my next question.

THE COURT: Don't add anything else. Go ahead, tell us what you did.

THE WITNESS: I was armed with the court order with regard to putting a wiretap on the telephone of CA-6-8854.

I also had in my possession the appearances for this particular subscriber's phone which showed up in the rear of 185 Mulberry Street, Manhattan.

I then attached two conductor wires to the terminals with pair 121, cable 3719, binding post 20. I then stretched this wire to a location where I had an automatic tape recorder installed.

I then installed this wire onto that tape recorder. After hooking up to the tape recorder I put a tape on this tape recorder. It was a clean tape, sealed. I broke the seal [214] and placed it on his recorder.

I then checked the phone to see if the recorder was starting and stopping properly, and it was. I also checked that it was the correct party that we were armed with because I heard a conversation on the phone where someone called into the phone and said "Patrissy's Rest."

[215] Q Can you tell me which particular number of Patrissy's Restaurant you tapped into?

A CA 6-8854 was the telephone number.

Q Now, did you secure the machine, sir?

A Yes. I had the machines located in a room secured with a padlock, and I had the key for that room.

Q What if anything did you do with the key to that room?

A I brought it back to the office, in my possession.

Q Did you subsequently turn that key over to any person?

A I turned it over to my squad commander, Sergeant Tozzi.

Q Now, you never did take that reel off, is that correct?

A I don't believe I did. I would say no.

Q I show you People's Exhibit 10 for Identification and I ask you whether or not this is the particular reel that you broke the seal on and placed on the machine in the basement at 185 Mulberry Street, tapping Patrissy's Restaurant, Canal 6-8854 on July 3, 1964.

A This tape I did place on the machine on July 6, 1964.

[216] Q On July 6, I am sorry. When I said July 3, I meant July 6. On July 6, sir?

A July 6, 1964.

Q Did you take that tape off?

A No, I did not.

* * * *

[259) CROSS-EXAMINATION

BY MR BOUSE:

Q Detective Crawford, how long would you say that you spent on this case totally, in your investigation?

A It's very hard to say. It was on numerous days. I couldn't place it down to hours, sir.

Q Well, I don't expect you to do that.

Would you say that you spent a number of days, numerous days?

A Yes.

Q Would you say you spent thirty days? I don't mean thirty consecutive days, but approximately thirty days of man-hour days, working days on this case.

A It could very well possibly be.

Q Give or take a little more or less, that would be your answer?

A Yes, sir.

Q Now, was your job on this particular case confined to wire taps, wire tap evidence, setting up recorders and so on? Was that your sole function?

A That is correct.

* * * *

[273] Q Now, this equipment, all of this tape recording equipment, this is all purchased by the County, of course, as part of police equipment?

A That is correct, sir.

Q Now, could you give us, Detective Crawford, for example, if you can—and if you can't do it exactly, to the best of your knowledge—the number of reels of tape that were used in this entire investigation—and I am talking about the Holzman situation and all of the facets with regard to outlying bugs and taps. Could you give us the entire number of reels in numbers?

[274] MR. DOOLITTLE: Objection, your Honor. I think that is wholly immaterial.

THE COURT: If he knows. I don't know whether it is immaterial or not at this time. At this point I don't know. Overruled.

Do you know?

THE WITNESS: I don't know definitely how many tapes were used, no, sir.

Q I can appreciate that, Detective Crawford. Do you think this: Do you think that you could hazard an approximation, knowing the number of places—let me ask you this: Just the places that you had something to do with, the office at Tenth Avenue, the phone booth, the Holzman premises, and I think you testified to some other areas that you installed recording equipment at.

A I did, sir, yes, sir.

Q Do you think this—taking into consideration just the things that you had personal knowledge of: Do you think that you can approximate the number of reels that were taken during the entire investigation on this matter?

A I would say over a hundred, maybe more, maybe [275] two hundred; more. Honestly, I have never sat down and actually counted the tapes that were placed on it.

Q Because most of them would be working automatically around the clock and you wouldn't have to be there and they would be changed by people who would go around?

A I understood you to say somebody would have to be there?

Q No. I say you wouldn't have to go there.

A No; they were going twenty-four hours a day automatically.

Q But you say it could come to 200 reels?

A I said a hundred or it could be 200 or more than that. I don't know. I never counted them.

Q Let me ask you: When a reel is taken from the recording device after the tap, you say it is returned to the district attorney's office and you turned it over to a Sergeant Tossig?

A Tozzi, T-o-z-z-i.

Q And he would have continuous possession—I mean you would have continuous possession of it up until that time?

[276] A That's correct.

Q And Sergeant Tozzi would put it away for safekeeping?

A He would.

* * * *

[295] CRAWFORD—REDIRECT

Q Now, I don't know whether or not you testified, but I think Mr. Bouse asked you a question, something about 100 tapes, 200 tapes. Was that an accurate count, sir, or were you guessing?

A It was not an accurate count. I was guessing.

Q Have you any idea, specifically, how many tapes, reels of tapes you yourself or were put on—let me put it this way.

Have any reels of tapes been put on the number Mayfair 1-1290 during the month, say, from June—the pe-

riod from June 9 when you first put the second tape on up to approximately sometime in the middle of July? Do you have any idea?

A I have no idea.

Q You don't know whether it was one, ten—you know it was more than one, because you put one, two, three, four—you had something to do with at least four of them. Could it have been ten, as far as you know?

[296] A As far as I know, it could have been ten, yes.

MR. DOLITTLE: Thank you.

* * * *

[301] JOHN SKUZENSKI, Shield 158, Main Office squad, Nassau County Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Skuzenski, you are a detective of the Nassau County Bureau of Division of Detectives, Nassau County Police Department, attached to the District Attorney Rackets Squad; is that correct, sir?

A Yes, sir.

Q How long have you been on the Rackets Bureau?

A Since December 1962.

Q Did there come sometime in 1964, specifically on July 3, 1964, when you, together with Detective Beach, went to the basement of 686 Eighth Avenue, New York City?

A Yes, sir.

Q Now, at that particular time were you present when Detective Beach set up a monitoring device?

A Yes, sir.

Q A wire tapping device, rather.

At that time, Detective Skuzenski, did you place a tape on to the machine that Detective Beach set up?

[302] A I did.

Q I show you People's Exhibit 9 for Identification and I ask you, sir, whether or not this is a tape that you placed on that machine on July 3?

A Yes, it is.

Q 1964. Will you tell me how you identify that tape as being the one that you placed on it?

A I placed my initials on the box.

Q Was the tape a new one or a used one at the time you put it on there?

A It was new.

Q You never took it off, is that correct?

A No, sir.

Q All right. I show you People's Exhibit 4 for Identification—

THE COURT: Just a minute.

What are your initials?

THE WITNESS: J. S.

THE COURT: Where are they?

THE WITNESS: On the back of the box.

THE COURT: All right.

Q Would that be the upper left-hand corner as you look at the back of the box, sir?

[303] A Yes, Sir.

THE COURT: All right, next question.

* * * *

[304] Q Now, as to People's Exhibit 9, were you present at the time that Detective Beach—People's Exhibit 9, that first tape—in the basement of 680 Eighth Avenue, were you present at the time Detective Beach checked the machine to ascertain whether or not that machine was operating properly and recording properly?

A Yes, I was.

Q Incidentally, People's Exhibit 4 for Identification, was that a brand-new tape or was it a used tape when you put it on?

A Brand new. I broke the seal.

Q And you broke the seal on People's Exhibit 9, is that correct?

A Yes.

Q I ask you to pick up People's Exhibit 9 once more, sir.

Did there come sometime on July 15, 1964, when you went to Sergeant Tozzi and requested this particular tape?

A I did.
Q Did you get it?
A Yes, sir.
Q Where did you get it from?
[305] A From a locked cabinet in the office of the District Attorney's Office.
Q Did you open that cabinet or Sergeant Tozzi?
A Sergeant Tozzi opened it and I removed this exhibit.
Q All right. Did you have that tape with you during the day of July 15, 1964?
A Yes, I did.
Q Was it continually in your possession, sir?
A Yes.
Q Did there come sometime when you returned it to Sergeant Tozzi and observed him put it back into this locked cabinet?
A Yes.
Q All right, now, during the time that you had that tape in your possession on July 15, 1964, from the time that you got it to the time that you returned it, did you alter it, change it, amend it, add to it, erase from it in any manner whatsoever, Detective Skuzenski?
A No, sir.
Q Was it in identically the same condition when you returned it as it was when you took it out?
A Yes, it was.
[306] Q You did, however, play it, is that correct?
A Yes.
MR. DOOLITTLE: I have no further questions of Detective Skuzenski at this time.
I will state for the record, as I advised the Court before, I will recall Detective Skuzenski for further testimony.
Accordingly, I will give to Mr. Bouse the grand jury testimony of Detective Skuzenski, sworn to on July 16, 1964, pages 65 to 72 and pages 132 and 131.
MR. BOUSE: With the Court'd indulgence, your Honor, for about a minute.
Your Honor, relying on Mr. Doolittle's promise to bring Detective Skuzenski back, I will limit my cross-examination to the tapes as they were produced.

THE COURT: You are limiting your cross-examination specifically to the evidence that was adduced on direct examination?

MR. BOUSE: Yes.

THE COURT: With, of course, any right and reservation for subsequent cross-examination if, and when he is produced and recalled by the People.

[307] MR. BOUSE: Yes, sir. I am relying on the fact that he will be recalled.

MR. DOOLITTLE: He will be, your Honor. No question about it.

THE COURT: All right. If not, I will let you call him.

MR. BOUSE: Thank you.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Detective Skuzenski, your sole or the sole basis upon which you identified the tapes or the objects that were shown to you by Mr. Doolittle, are your initials on the cartons thereon, is that so?

A Yes, sir.

Q You say that Detective Beach would set up the recording equipment—I am referring to the first exhibit or the first item that you looked at—Detective Beach would set up the recording equipment and you would place the tape on the machine?

A Yes, sir.

Q And of course this is an automatic machine that would go into operation whenever the phone would be used, but would lie dormant when the phone was dormant?

[308] A Yes, sir.

Q And that would alleviate the necessity of a detective being present during the continual operation?

A Yes, sir.

Q Now, could you tell us, Detective Skuzenski, when you set up the first machine on July 3, 1964, at 680 Eighth Avenue in New York City, when did you return to remove the reel?

A I didn't return.

Q Do you know who did?

A I believe Detective Costello.

Q Well, you do know, Detective Skuzenski, that for a period of time the machine, of course, was unattended?

A Yes.

Q It would be working automatically?

A Yes.

Q And, of course, it would be possible for anyone to replace that reel with another reel, wouldn't it, during that period of time?

A No, sir.

Q Why not?

A Where the machine was located it was in a secured area.

[309] Q Well, let me put it this way: If someone found the machine or someone knew where the area was, there would be nothing to prevent him from replacing this reel with another reel, isn't that so?

A Unless they broke into the secured area.

* * * *

Q Let me put it this way, Detective Skuzenski: If someone had access to the place where the recording machine was, it would be possible for him to replace the [310] reel with another reel, isn't that so?

MR. DOOLITTLE: Objection, your Honor, as to the form. Access means a key to the padlock.

THE COURT: Well, just phraseology. See if you can phrase it without combining two aspects.

Q Well, by aspects, Detective Skuzenski, I mean he had a key to the place or he broke in or in some way he got in, if that happened it would be possible for him to replace one reel with another, isn't that so?

A If anyone knew anything about recorders, yes, sir.

Q Well, he just—this is a recording machine that you could buy in any store, isn't it?

A Yes.

Q Nothing particularly complicated about it, is there?

A No.

Q And you could easily—the layman could put another reel on to replace that reel that is already on, isn't that so?

A To appear that it wasn't tampered with?

Q No, I didn't ask you that. If one reel could be replaced by another reel.

[311] A Yes.

Q And, of course, when these conversations would come in, they wouldn't come in with the number being asked for by the caller—I withdraw that.

You never hear the phone number on the tape, do you?

A On an in-coming call?

Q On an in-coming call. You never hear the phone number?

A No, sir.

Q The first thing you hear is the ring and then someone says something?

A Yes, sir.

MR. BOUSE: I have no further questions.

MR. DOOLITTLE: I have further redirect, in a sense, your Honor, because I am reopening my direct. There was something I omitted relative to these tapes.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q At the time that you set up People's Exhibit 9 in the basement of 680 Eighth Avenue, prior to that, did you and Detective Beach do anything relative to obtaining a padlock?

A Yes, sir.

[312] Q Will you tell me what you did?

A I went and purchased a padlock at a hardware store.

Q How many keys did you get with it?

A Two.

Q What, if anything, did you do with that padlock after you purchased it?

A Once the installation was made I put the reel on the tape recorder. When we were ready to leave the

premises I secured this room with the padlock by locking this room that we had the recorder in.

Q What did you do with the keys, sir?

A I turned them over to Detective Costello.

Q Both keys, is that correct?

A Yes, sir.

Q And that is the gentleman sitting right here [indicating]?

A Yes, sir.

Q You didn't keep one of the keys yourself, did you?

A No, sir.

Q You didn't throw one of the keys away?

A No.

[313] Q You gave them both to Detective Costello?

A Yes, sir.

Q You, of your own knowledge, don't know what Detective Costello did with them, is that correct?

A That's right.

Q That was the beginning of a weekend, wasn't it, if you can recall?

A Yes, sir.

MR. DOOLITTLE: Thank you very much.

MR. BOUSE: One other question.

RECROSS-EXAMINATION

BY MR. BOUSE:

Q Now, Detective Skuzenski, you, of course, secured permission from someone to go upon these premises and padlock this particular area for the tape?

A Yes, sir.

Q From whom?

A Detective Beach handled that part of it.

Q You don't know from whom Detective Beach obtained the permission?

A No. He spoke to someone.

Q Did you see him speak to a person?

A No, I don't think I did. No.

[314] Q Did you see the person at all?

A No, I don't believe I did. No.

Q So this is what Detective Beach told you?
A Yes.
MR. BOUSE: I have no further questions.
MR. DOOLITTLE: Thank you very much, Detective Skuzenski.
I call Detective Costello.

THOMAS COSTELLO, Shield No. 77, Main Office Squad, Assigned to the District Attorney's Office, Nassau County Police Department, being first duly sworn, testified as follows:

DIRECT EXAMINATION

* * * *

[315] BY MR. DOOLITTLE:

Q Detective Costello, you are a detective in the Division of Detectives of the Nassau County Police Department, is that correct?
A That's right.
Q And are you attached to the District Attorney's Rackets Bureau, is that correct?
A Right.
Q How long have you been attached to the District Attorney's Rackets Bureau?
A Approximately since 1960.
Q In the course of your duties as a detective of the Nassau County District Attorney's Rackets Bureau, did you have occasion on July 5, to go to premises 680 Eighth Avenue, New York City, the basement of that premises?
A That is correct.
Q Prior to going there had you received anything from Detective Skuzenski, the previous witness?
A Yes, I had received from him two keys which I would have needed at that location.
[316] Q When you went to that location what, if anything, did you do?
A I went to the location and at that time we had a machine set up in the baggage room. I entered the baggage room with the keys I had available and removed the tape from the machine and at that time replaced it with a new tape.

Q Now, sir, I show you People's Exhibit 9 for Identification and I ask you what if anything you did with that —I withdraw that.

Have you ever seen that before?

A Yes, I have.

Q When for the first time did you see that, sir?

A The first time I saw this tape would have been on July 4, 1964.

Q Where?

A At approximately 1100 hours which is 11 o'clock a.m., at that location.

Q Where did you see it, at 680 Eighth Avenue?

A Yes, sir.

Q How did you gain access to it?

A With the keys that I had.

Q What if anything did you do with it on the 4th of [317] July, 1964?

A At that time I checked the machine to see if it was working properly and the tape at that time did not have to be changed and I secured the room and left.

Q Did you ascertain whether or not the machine was operating properly and was, in fact, recording properly?

A Yes, it was.

Q When did you see it again, People's Exhibit 9 for Identification?

A July 5, 1964.

Q How did you gain access to it at that time?

A I gained it by the keys that I had in my possession, which fit the padlock on the room where we had the machine located.

Q What if anything did you do then, sir?

A At that time I removed the tape from the machine and brought it back to the District Attorney's Office—no, excuse me—that was on a weekend which would have been Sunday, and being that the District Attorney's Office was not open I brought the tape home with me.

Q Did you secure it in your home?

A Yes, I did.

Q Where did you secure it in your home?

[318] A. I kept the tape where I keep my guns.

Q Does anybody have access to that place other than you?

A No, sir.

Q Do you have children, incidentally, Mr. Costello?

A Yes, I do.

Q Did you take the tape away from the place after any time thereafter, People's Exhibit 9 for Identification, from the place where you keep your guns?

A Yes, I did.

Q When did you take it?

A That would have been Monday morning, July 6, at which time I brought it to the District Attorney's Office for safekeeping.

Q What if anything did you do with the keys that you had?

A I returned the keys to Sergeant Tozzi.

Q During the time that you had that tape in your possession, Detective Costello, did you do anything to change it, to add to it, to detract from it, to erase on it, to do anything whatsoever to that particular tape?

A No, sir.

[319] Q At the time that you turned it over to Detective Sergeant Tozzi, was it in identically the same condition when it was when you removed it from the machine in premises 680 Eighth Avenue, New York City?

A Yes, it was.

* * * *

[320] Q Incidentally, when you gave People's Exhibit 9 for Identification to Detective Tozzi, what if anything did he do with this?

A He also put that in the cabinet underlock.

Q And secured it again?

A Yes, sir.

* * * *

[321] Q Now I show you People's Exhibit 9 for Identification and ask you how you identify doing what you did to that particular tape.

A On the back of the box is indicated the time and the date, and next to it is my initials T.C. indicating that I would have removed this tape from the machine.

MR. BOUSE: Your Honor, may we have a continuing objection to Detective Costello's testimony and, of course, [322] Detective Skuzenski's testimony at this time inasmuch as it is incompetent, irrelevant and immaterial.

THE COURT: I overrule your objection but I will admonish the jury: No connection at this time with the defendant. You understand that?

MR. BOUSE: I respectfully except.

* * * *

[338] THE COURT: Well, no, pass them up.

Q Well, let me ask you this: Detective Costello, you are familiar with each and every one of the tapes on People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 for Identification, am I correct?

A Yes, I am.

[339] Q Did there come sometime at my request and in my office that you gave these to some person?

A Yes I did.

Q Now—

THE COURT: Well, now, just a minute. All right, go ahead.

Q Prior to your giving them to some person, did you obtain them from some place?

A Yes, I did.

Q This is People's Exhibits 1, 2, 3 ,4, 5, 6, 7, 8, 9, for Identification—I'm sorry and 10 for Identification.

A 10.

Q Including 10 for Identification?

A Yes sir.

Q You know which one that is?

A Yes sir.

Q Did you do that on instructions from me, sir?

A Yes.

Q Where did you obtain these particular tapes prior to bringing them into my office, pursuant to my request?

A From Sergeant Tozzi.

* * * *

[341] Q Detective Costello, I ask you to look at People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification and I ask you sir, at sometime in the month of September 1964 did you see those particular tapes?

A Yes, I did.

Q Did you see them pursuant to orders that you got from me, sir?

A Yes, sir.

Q Will you tell me where you got them and where you saw them for the first time.

A Around September 11, 1964, I received these tapes, on request from Mr. Doolittle, from Sergeant Tozzi.

Q Did you see where Detective Sergeant Tozzi got them from?

[342] A From the cabinet in our office, which is secured by lock and key.

Q What, if anything, did you do with those tapes when you got them from Detective Sergeant Tozzi?

A At that time these tapes were handed to Don White, the court stenographer, and he kept them in his possession until about September 28, 1964, at which time transcripts were made from the recordings on these tapes.

Q All right. You got them from Detective Sergeant Tozzi, is that correct, sir?

A That's correct.

Q Did you bring them into my office at my request?

A I believe I brought them into your office and Don White was present at the time.

Q At that particular time did you hand over People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification to Donald J. White?

A Yes, I did.

Q You know him to be a confidential reporter for the District Attorney's Office? He works a little machine like Mr. McGrath, a stenotype machine, is that correct?

A That's correct.

[343] Q All right. That was on September 11, 1964?

A When I received them, September 11.

Q When you received them and gave them to White. Did you see them thereafter, up until a certain point?

A I didn't see them again until they were returned to me by Don White approximately September 28, 1964.

Q When he returned these particular exhibits, People's 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, did he

also return or give to you certain other things in my presence, in my office?

A Yes. When he returned the tapes he also returned or gave us a transcript of the conversations that were on these tapes.

Q Thereafter, did you take these exhibits, People's 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, and return them to Sergeant Tozzi and have them placed in a place for safekeeping?

A I did.

Q Were you present when I took the transcripts and put them in a safe place in my office?

A Yes, I was.

Q Now, there came sometime when in preparation for this case you were assigned to me to assist me in the [344] preparation of this case, am I correct, Detective Costello?

A That's correct.

Q And on one or more occasions witnesses came in, is that correct, sir?

A That's correct.

Q Do you ever recall Irving Holzman coming in on more than one occasion to my office?

A Yes, he has.

Q On those occasions, on request from me, did you obtain People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, and bring them into my office while Mr. Holzman was there?

A Yes, I did.

Q Did these Exhibits 1 through 10, inclusive, ever leave your possession during that time?

A No, they did not.

Q Did you play those tapes, People's 1 through 10, inclusive, for Mr. Holzman in my presence?

A Yes, I did.

Q At the time you played them, in the presence of Mr. Holzman, did you also present to him transcripts which I had in my possession?

A Yes, I did.

[345] Q All right. Did we do this on more than one occasion?

A Yes, we did.

Q At any time that you ever had possession of these tapes when Mr. Holzman was in the office or any other witnesses were in the office, did you ever do anything to add to these tapes, to detract from these tapes or erase from these tapes, to overplay on these tapes, to cut these tapes or alter or amend or change these tapes in any manner whatsoever?

A I did not.

Q At any time that you had these tapes and you returned them, were they in identically the same condition when you returned them as they were when you got them, sir?

A Yes, they were.

Q During last week at the request of myself and Donald J. White, did you do anything relative to those particular tapes, People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification?

A Yes. Last week I believe it was last Thursday, when we didn't have any court, Mr. Holzman, the complainant came into the office and at that time the tapes were played for him.

[346] MR. DOOLITTLE: I have no further questions, your Honor. I will present to Mr. Bouse, the grand jury testimony of Detective Costello, sworn to July 16, 1964, pages 91 through 94.

THE COURT: All right. The record will so indicate.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Detective Costello, would you say that you had more to do with the setting up of the machines and the subsequent recordings of the conversations than any other detective in the Rackets Squad of the District Attorney?

A Well, I would say that—if I can answer the question this way—I would say that I had probably more to do with listening to these tapes or having them played for Mr. Doolittle, for a witness or a complainant, as we prepared this case.

Q Well, if you can give an exact figure, do so. If you can't, could you give us the approximate number of reels that were employed in the entire operation, from its beginning to its end?

A In reference to the overall investigation of this case?

[347] Q That's right, including monitored conversations, taps, bugs, phone booths, Mr. Holzman's basement, his office, all of them, the headliner, whatever.

A Well, I could maybe give you an example. From June 9, 1964, up to July 2, 1964, which is a little less than a month, we had taken off of that phone eight tapes.

Q Off of one phone?

A Off the one phone.

Q Now, could you—

MR. DOOLITTIE: Which phone was that?

Q Which phone were you referring to?

A That was the phone MA 1-1290, which would be in the complainant's home, Mr. Holzman.

Q That would be eight tapes from his home. Could you tell us how many tapes were taken from the phone booth in the drugstore, that we have discussed?

A To my knowledge, there were two tapes.

Q Only two from the drugstore.

* * * *

[351] Q Now, will you tell us, Detective Costello, how many reels were removed from the tap on the Headliner Bar?

A I have no idea.

Q Could you hazard a guess?

A It would be very hard to say.

Q Would you say it was one hundred?

A I doubt if it would be one hundred.

Q Certainly over fifty?

A No, it's probably less than fifty.

Q Would you say it was more than thirty-five?

A If I was to guess, I'd say maybe ten or fifteen.

Q Ten or fifteen from the Headline Bar?

A And that would be strictly a guess.

Q Would you know where these reels are now, Detective?

A No, I have no idea where they are.

Q Well, let me ask you, Detective: Would the reeel be discarded if in the opinion of the detective who listened, to it it contained nothing valuable?

A No. When we work on a case, an investigation, all the reels are kept.

Q No matter how inocuous they may appear?

[352] A That's correct.

Q So that this ten or fifteen reels from the Headliner Bar are not in the custody of the District Attorney's Office?

A They could very well be.

Q Well, is there any doubt in your mind, Detective?

A No.

Q That they are in the custody of the District Attorney, and could be produced if it was necessary?

A Yes.

Q Now, we have discussed Holzman's home and we have discussed his office and we have discussed the phone booth and the Headliner Bar. Now, was there any other place where a tap with recording devices was set up?

A I know there was one set up on Patrissy's Restaurant.

Q Did you have something to do with the setting up of that tape?

A No, I had nothing to do with setting up of any taps?

Q Could you do this, Detective: Could you estimate the number of reels that might have been taken from the [353] taps set up at Patrissy's Restaurant?

A I have no idea.

Q Would you say again it might be something like ten or fifteen as of the Headliner?

A Could be; could be less, could be more. I have no records to indicate exactly how many taps were taken off any tap.

Q And, again, of course, whether they were inocuous or not, they would now be in the custody of the District Attorney's Office?

A That is our policy, to hold on to those taps until such time as the case is disposed of.

Q And there is no reason in this particular case to vary that policy?

A No.

Q Now, do you know of any other place, Detective Costello, where a tap and recording device were set up?

A Not to my knowedge. I have no other idea of any other places that have been tapped. I have nothing to do with them if they were.

* * * *

[354] Q Now, how many tapes—and I am talking about specific conversations such as we have referred to on the prior questioning—would you say you listened to, yourself, personally? On replay, I am talking about.

A Well, I have heard every tape that is on the table right now. I believe it's ten tapes.

Q Would you say you heard all of the tapes that were taken during the entire investigation, the ten or fifteen from Patrizzy's, the ten or fifteen from the Headline? Would you say that you heard the total amount of tapes that were consumed in the investigation?

[355] A No, sir, I didn't.

Q Now, do you know who made the selection of the tapes that you heard? Was it Mr. Levy?

A I have no idea who actually made the selection of what tapes that I listened to.

Q A selection fas made, though, Detective Costello, isn't that so?

A Yes.

Q Selection of tapes were made. Do you have any idea who made the selection?

A Well, it would have been either my immediate boss, Sergeant Tozzi, or one of the Assistant District Attorneys in the Rackets Bureau handling the investigation.

Q Now Sergeant Tozzi is more or less the custodian of this material, isn't he?

A He is also my immediate boss, plus having control of the tapes.

Q Well, it isn't his job to determine their substantive value, is it?

MR. DOOLITTLE: Oh, if your Honor please—

Q If you know.

MR. DOOLITTLE: I am going to object.

THE COURT: Sustained.

[356] MR. DOOLITTLE: It's always a lawyer's function—

THE COURT: Sustained, sustained.

Q Now, did you have anything to do with a tap that was set up on the District Attorney's phone, over which a call was made by one Joe Albino?

MR. DOOLITTLE: Objection, your Honor. There is no such testimony that any such—

MR. BOUSE: I withdraw it.

MR. DOOLITTLE: He is assuming there was such a tap.

THE COURT: I will take care of that.

Yes or no,

THE WITNESS: No.

THE COURT: All right, the jury will disregard the question and the answer competely.

Q I'll ask you this: Do you know of your own knowedge whether such a tap was set up?

A To my knowledge, no. I have no idea.

Q Now, when you removed or when you were in the process of removing the tape from the Holzman basement, did you on that occasion play the tape for any member of the Holzman family?

[357] A No, I did not.

Q Did you at any time play the tape back on the bugging of the Holzman office? I am not talking about when we were in the District Attorney's Office, I mean at Holzman's office the day that the tape was made.

A That tape was removed from the machine and brought—in fact, it was brought right back to the District Attorney's Office. It was not played there.

Q It was not played for Holzman at that time?

A No.

Q Did you have anything to do with the removing of the two tapes from the phone booth?

A No, I did not.

Q So you don't know of your own knowledge whether they were played for Mr. Holzman?

A At that time, no, I wouldn't know.

Q But there did come a time when all the tapes were played for Mr. Holzman, at least all the ones that you see on the table there?

A That's correct.

Q And was this done more than once?

A Yes, it was.

Q Would you characterize this operation as unusual?

[358] MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained.

Q Now, Detective Costello, are there duplicates of these tapes?

A No.

Q You know that for a fact?

A Yes, sir.

Q These are all original tapes?

A Yes.

Q And they are the only ones that exist?

A That's correct.

Q Now, did you ever play any of these tapes for the defendant?

A No, I did not.

Q Were you ever present when any of these tapes were played for the defendant?

A No, I was not.

* * * *

FRANK VEDDER, Shield 184, Nassau County Police Department, assigned to the district attorney's rackets bureau, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Vedder, you are a detective of the division of detectives of the Nassau County Police Department attached to the district attorney's rackets bureau; is that correct?

A Yes, sir.

Q How long have you been assigned to the D.A.'s rackets bureau?

A It is close to five years, sir.

[363] Q Did there come some time prior to September 1964—sometime after July 5, 1964, when you were ordered by Mr. Norman Levy to listen to and monitor People's Exhibit 9 for Identification, tape RC 05 R1?

A Yes, sir.

Q How do you identify the fact that you listened to and monitored that tape recording?

A I have my initials on the box.

Q Is that the procedure in the district attorney's office—the detective who monitors it puts his name on it?

A Yes, sir.

Q Do you also happen to know that Detective Skuzenski and Detective Costello aso listened to that particular tape on occasions other than when you listened to it?

A Yes, sir.

Q Let me ask you: Where did you get this tape when you were ordered to monitor this particular tape, People's Exhibit 9 for Identification?

* * * *

[364] A I would get this tape from Sergeant Tozzi, the commanding officer of the squad.

Q Did you see where he got it from?

A Yes, sir.

Q Where?

A From a locked cabinet in the office.

Q Do you know who has the key to that?

A Yes.

Q Who?

A Sergeant Tozzi.

Q Did you get it that way? Is that how you got it—from Tozzi after he unlocked the cabinet?

A Yes, sir.

Q During the time that you took it from Detective—let me withdraw that.

Did there come some time that day when you returned it to Detective Sergeant Tozzi?

A Yes, sir.

Q Was it continually in your possession from the time that you got it from Detective Sergeant Tozzi until the time you returned it to Detective Sergeant Tozzi?

A Yes, sir.

[365] Q Did you see what Detective Sergeant Tozzi did with it when you returned to to him that day?

A Yes, sir.

Q What did he do with it?

A He put it back in the cabinet and locked it.

Q Fine. Now, during the time that you had it continuously in your possession did you do anything to that reel of tape to alter it, change it, add to it, erase it, amend it or change it in any way whatsoever?

A No, sir.

Q When you returned that tape to Detective Sergeant Tozzi was it in identically and exactly the same condition as it was when you received it from Detective Sergeant Tozzi?

A Yes, sir.

* * * * *

MR. DOOLITTLE: Excuse me. For the record, this witness did not testify before the grand jury, your Honor.

THE COURT: All right.

[366] MR. BOUSE: May we still have a continuing objection based upon the order of proof upon which the prosecution is proceeding and we respectfully except to the overruling.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. BOUSE:

Q Detective Vedder, do you know yourself approximately how many reels were obtained in the entire investigation?

A No, sir.

Q Do you know the total number of places where taps or bugs or monitored setups were accomplished?

A No, sir.

Q Do you know whether at any particular time with reference to the particular investigation of this case there was a tap set up on the district attorney's office phone?

A No, sir.

Q You don't know?

A Not to my knowledge.

Q Do you know of your own knowledge whether there [367] was a tap set up on the phone of Audrey Graziano?

A No, sir.

MR. DOOLITTLE: Objection; wholly immaterial.

THE COURT: I don't know but he says no, sir, and that is the answer.

Q Or Rocky Graziano?

A No, sir.

Q You don't know?

A I don't know, sir.

Q Did you have anything to do with this investigation, Detective, other than the tape you are talking about?

A No; I just monitored this tape, sir.

Q And that was the sole amount of contact you have had with this particular case?

A To the best of my knowledge, yes, sir.

Q The picking up of this tape from where it was?

A From the sergeant.

Q From the sergeant? In other words, you don't have any other information with regard to that tape other than you conveyed it?

A Monitored the tape, sir.

[368] Q What voices are on the tape?

A I don't know, sir.

Q You just heard voices?

A Yes, sir.

Q Do you know the number of the phone, the phone number that was involved on this particular tape?

A I don't recall, sir.

Q Where were you physically when you were monitoring the conversation?

A In the office, in the rackets bureau office.

Q In the district attorney's office?

A Yes, sir.

Q Was this a conversation that was being held on one of the district attorney's phones that you were monitoring?

MR. DOOLITTLE: Objection.

THE COURT: SUSTAINED:

* * * *

[369] BY MR. BOUSE:

Q Detective Vedder, the monitoring you did on this occasion, was there a conversation that was being conducted on one of the district attorney's phones?

A I don't understand you.

Q Well, you were doing it in the district attorney's office?

A Yes.

Q And was it a live conversation, so to speak?

A No, sir.

[370] MR. DOOLITTLE: That is not what has been testified to.

THE COURT: Just object. Sustained.

Q What I am trying to find out is, do you know where the two points of the conversation were, from where to where of the one you monitored.

A I don't recall them right now, sir.

Q But it wasn't a call that was coming into or going out of the district attorney's office?

A No, sir.

Q But you don't know where the conversation was?

A No, sir.

MR. BOUSE: I have no further questions.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Just to get this straight: At the time that you got this tape from Detective Sergeant Tozzi there were already conversations on it. Is that correct?

A Yes.

Q And you just played it, and that is what you mean by monitoring it? You listened to this conversation; am I correct?

[371] A Yes.

Q The conversations that were on there; correct?

A Yes, sir.

Q Then you returned the tape to Detective Sergeant Tozzi; correct?

A Yes, sir.

Q So that during the time you had it you did nothing to this; it was identically in the same condition when you returned it as when you got it; correct?

A Yes.

Q It wasn't a tape of a conversation that was going on while you were sitting there with earphones listening to somebody who was actually at the same time making a telephone call?

A No, sir.

MR. DOOLITTLE: Fine.

* * * *

[393] MR. BOUSE: Your Honor, may the record indicate a continuing objection because no foundation has been laid for any of this testimony with regard to the defendant, Thomas Kaiser.

THE COURT: You have an objection. I am overruling the objection with the additional admonition, you understand that there is absolutely no connection here with the defendant at this time where any of this foundation is being laid. You are not to infer it. Any question in anybody's mind? All right.

MR. BOUSE: Thank you, your Honor. I respectfully except.

THE COURT: Yes.

[394] DONALD J. WHITE, residing at 247 North Delaware Avenue, North Massapequa, New York, called as a witness on behaf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. White, by whom are you employed and in what capacity?

A I am employed by the District Attorney of Nassau County, under the title of Confidential Reporter.

Q I see. What are your duties as a confidential reporter of the District Attorney's staff?

A I do the verbatim reporting and transcription of the Nassau County Grand Juries, question-and-answer

statements taken in connection with D.A. investigations and transcriptions of tape recordings.

Q Will you give us something of your experience and qualifications in this particular field, Mr. White.

A I am a certified shorthand reporter. I was certified in 1959 by the State of New York. I had two years' experience in court reporting in the United States Army, four years' experience as a freelance reporter at which time I had various per diem assignments with almost [395] every court in the state, examinations before trial, board of directors, stockholders' meetings, conventions and conferences. In 1963 I came to the District Attorney's Office.

Q Have you testified as an expert on transcriptions that you have made of tape recordings, sir?

A Yes, sir, I have, in the County Court and the Supreme Court of Nassau County.

Q Now, sir, did ther come sometime, specifically September 11, when you were in my office together with Detective Costello?

A Yes, September 11, 1964.

Q Did Detective Costello do something to you at my request, in my presence, in my office?

A Yes, sir. He delivered to me tape recordings.

Q I show you People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and ask you whether or not, in fact, those are the tape recordings that were given to you by Detective Costello on September 11 in my office.

A Yes, sir, these are the tapes. I identify them by my initials and number that I placed on them.

Q All right, fine. Now, pursuant to my orders, did you do something relative to People's Exhibits 1, 2, 3, [396] 4, 5, 6, 7, 8, 9 and 10 for Identification?

A Yes. I transcribed certain conversations that were on these tapes.

Q Certain meter readings, is that correct?

A Right.

Q Now, will you tell the jury mechanically what you did in transcribing the metered readings on those People's Exhibits 1 through 10, inclusive?

THE COURT: You understand this is not the substantive part, this is just the probable aspect.

THE WITNESS: Yes, your Honor.

A Take one tape recording at a time and place it on the recorder with a set of head phones. I had been given the reading number where the conversation started and where it ended, approximately; listened to the recording initially without taking anything down. Then I take it down by means of a stenotype machine, which you see the court reporter has here. After I do that I again replay the conversation and make corrections, additions or deletions on the tape. At that point I make a typewritten rough draft and then again listen to it and make corrections, deletions or additions on the rough draft. It may be—on some of these you may have to listen to them many [397] times before you get a complete transcript. When it is complete it is then put on a stencil, run on a mimeograph machine and at the end of that time, when they are run off and collated, then I listen to it again. If I find anything else at that point I ink it in and initial it, and this was the procedure with every one of these.

MR. DOOLITTLE: Now I ask that this piece of paper be marked People's Exhibit 1-A for Identification.

[Paper referred to received and marked People's Exhibit 1-A for Identification.]

THE COURT: Do you have any offers? Do you want to offer them seriatim?

MR. DOOLITTLE: I am going to offer them 1-A, etc.

THE COURT: All right, fine.

Q Mr. White, I ask you to look at People's Exhibit 1-A for Identification and I ask you to also look at People's 1 for Identification, I think that's the top one, and I ask you if pursuant to my request you made a transcript of People's Exhibit 1 for Identification, the tapes, specifically meter readings 179 to 202.

A Yes, sir, I did.

* * * *

[408] Q Let me ask you this: In regard to People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 for Identification, during the time that you had all these exhibits, Mr. White, were they continually in your possession?

A Yes, sir.

Q Did anybody else ever have access to People's Exhibits 1 through 10, inclusively, for Identification?

A No. When I am not working on them—I only work on them one at a time—I kept them in a locked cabinet.

Q And who has the key for that?

A I have the key for that cabinet.

Q During the time you had People's Exhibits 1 through 10, inclusive, for Identification, did you at any time make any alterations, changes, additions, erasures, obliterations or did you alter, amend or change or do anything whatsoever to those tapes?

A No, sir.

Q When you returned those tapes, People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 to Detective Costello, were they exactly and identically in the same condition as they were when he gave them to you, sir?

A Yes, sir, they were.

* * * *

[417] I ask that this be marked People's Exhibit 9-a for Identification.

(Transcript referred to marked People's Exhibit 9-a for Identification.)

Q I ask you to look at Peple's Exhibit 9-a for Iden-
[418] tification and I ask you pursuant to my request did you listen to meter reading 137 to meter reading 306 in People's Exhibit 9 for Identification and whether or not in fact People's Exhibit 9-a for Identification is an accurate transcription of that meter reading.

A Yes, sir, it is.

Q And did you do that in the same manner that you did the others that you previously testified to?

A Exactly.

Q And this is an exact transcription?

A Yes, it is.

Q Let me ask you, sir: How many voices in that conversation, if you can recall?

A Two voices, number 1 and 2, plus an alphabetical designation of A.

Q Where 1 reoccurred you relabeled it 1, and where 2 reoccurred you labeled it 2; right?

A Right.

MR. DOOLITTLE: I ask that this be marked People's Exhibit 9-b for Identification.

(Transcript referred to marked People's Exhibit 9-b for Identification.)

[419] Q I ask you to look at People's Exhibit 9-b for Identification and also People's Exhibit 9 for Identification and I ask you, sir, whether or not People's Exhibit 9-b is an accurate transcription of meter reading 480 to 818 on People's Exhibit 9 for Identification which you did pursuant to my request.

A Yes, sir, it is, and it was done in exactly the same manner; two voices, numbers 1 and 2 plus an alphabetical designation of A.

Q And where 1 reoccurs you relabeled it No. 1, and where 2 reoccurs you relabeled it 2; is that correct?

A Yes.

MR. DOOLITTLE: I will take that back if I may. Now I ask that this be marked People's Exhibit 10-a for Identification.

(Transcript referred to marked People's Exhibit 10-a for Identification.)

Q I ask you to look at People's Exhibit 10-a for Identification and I ask you whether pursuant to my request you made a transcription from People's Exhibit 10 for Identification of meter reading 202 to 223, and whether or not People's Exhibit 10-a for Identification is an accu-

[420] rate transcription.

A Yes, sir, it is.

Q Did you make that in the same manner as the others that you previously testified to?

A Yes, sir, I did.

Q And how many voices appear on that particular telephone conversation?

A Two voices, 1 and 2, plus an alphabetical designation of A.

MR. DOOLITTLE: I will take that back and I have on further questions of Mr. White.

THE COURT: Any questions, Mr. Bouse?

MR. BOUSE: Just a few.

MR. DOOLITTLE: There is no grand jury testimony, I don't believe, of Mr. White.

THE COURT: Let the record so reveal.

CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. White, when you are called the confidential reporter for the district attorney's office, that means you keep secrets for the district attorney's office?

MR. DOOLITTLE: Objection, your Honor.

[421] THE COURT: Sustained.

Q Let me put it this way, Mr. White: You keep everything confidential?

A Yes, sir.

Q That's better. All right, let me ask you this: Did you read or monitor any other tapes than the ones you have talked about in connection with this particular case?

A No, sir.

Q You are sure of that?

A Yes, sir.

Q You listened to ten reels and that's all?

A Yes, sir.

Q Now, some of the conversations you heard—I'm sorry, do you want to say something?

A Is it ten reels?

Q I think it is ten—or whatever the number is.

A Yes.

Q Whatever were discussed here is the total number that you monitored during or with reference to this particular case?

A That's right.

[422] Q You transcribed only certain portions of these reels or the entire reel?

A No; just the meter readings that I received.

Q In other words, you would be given a reel and told which portion of the reel to transcribe?

A Right.

Q Now, I know this is a tough question, Mr. White, and maybe you can and maybe you cannot answer it. But if you can will you tell us: Do you have any percentage of the entire number of reels that you wound up transcribing and say like "I probably wound up transcribing fifty percent or thirty percent or ninety percent."

THE COURT: Do you understand the question?

Q. Let me reverse it and put it this way: Can you tell us what percentage of the total number of reels you didn't transcribe?

MR. DOOLITTLE: Objection. How would this man know how many reels there were?

MR. BOUSE: He got through saying there were ten.

THE COURT: Only as to form—if you can, rephrase [423] it. Do you understand what he is saying to you?

THE WITNESS: I think so, your Honor.

THE COURT: Try it again.

Q Let us put it this way: You testified that you transcribed reels numbered one through ten.

A Right.

Q And that you only—.

MR. DOOLITTLE: Well, your Honor, that is not correct.

THE COURT: Do you object to that?

MR. DOOLITTLE: Right.

THE COURT: Sustained.

Q How many reels did you transcribe?

BY THE COURT:

Q To those metered portions of the reels 1 through 10 marked for identification, did you have one hundred per cent transcription of the metered portions which you were asked to transcribe?

A Yes, sir.

THE COURT: Is that what you wanted to ask?
MR. BOUSE: That may be but I don't know.
THE COURT: Go ahead.

[424] BY MR. BOUSE:

Q Were there portions of the reels that you didn't transcribe?
A Yes.
Q Could you give us what percentage of the portions of the reels that you didn't transcribe?
THE COURT: If you know.
A No.
Q Now, of the reels that you did transcribe, although you say you don't characterize anything in your transcription—is that correct?
A Right.
Q But upon listening to them you could tell whether some were in a serious vein and whether some were in a humorous vein, weren't they?
MR. DOOLITTLE: Objection.
THE COURT: Overruled. Listen to the question. Do you understand that question?
THE WITNESS: I understand it so far, yes.
Q Would you say that some were serious and some were humorous?
THE COURT: Just a minute. The objection is sus-
[425] tained.
MR. DOOLITTLE: I will withdraw my objection.
THE COURT: No. I am only sustaining it on the ground that we didn't get an answer to the first question. Will you read the first question.

(Applicable question read by the reporter.)

THE COURT: This is the question where there was no answer. I will sustain the objection to the question and strike it out.

BY MR. BOUSE:

Q Could you tell from your listening to all the tapes that you testified to that there were some that were obviously humorous and some were obviously serious?

MR. DOOLITTLE: I have no objection.

A I felt that they were all serious.

Q You felt they were all serious?

A Yes.

Q You didn't hear anything in a humorous vein on the tapes—is that your testimony?

A In my own personal opinion, no.

[426] Q Well, let me ask you this: Did you make any mistakes on the original transcripts?

A The original transcripts?

Q Well, you made a set of transcripts, isn't that so?

A Yes.

Q And then you sought to correct them?

A Yes.

Q That would indicate that you made some mistakes on them, is that so?

A Yes.

Q Now, how many mistakes would you say you made on the original transcripts?

A Do you mean the original, the finished product?

Q No, the ones that you made. You made the original transcripts in September of 1964, isn't that so?

A Oh, yes.

Q Then didn't you testify that you came to Mr. Doolittle and said, "Look, I'd like to correct some of those"?

A No. Let me correct that—

Q Go ahead, you tell us.

[427] A At that time, in September of 1964, I had made the corrections in ink and initialed them. Last week I took those pages which had ink corrections on and retyped them and Xerozed them, photocopied them so that they would have a neater appearance. In other words, it's still a correction but it's typed in now instead of being inked in.

Q In other words, you made mistakes and you corrected your mistakes?

A Yes, sir.

Q And that was upon rehearing the tape?

A Not last week. This is upon rehearing the tape in September.

Q I'm talking about the inked corrections.
A Yes.
Q That was upon rehearing the tape?
A Yes.
Q Now, do you think, Mr. White, if you reheard the tape a few more times you might find a few more corrections to make?
A To the best of my ability I don't think so because I put in an enormous amount of time on this job.
Q And you didn't seek to characterize any of the [428] conversation?
MR. DOOLITTLE: Well, I think, your Honor, that's been answered. He said he characterized them as being serious.
THE COURT: Let him answer.
Overruled.
Yes or no.
A No, sir.
Q You said you didn't seek to characterize any of the conversation. In other words, if there was laughter you would put down laughter?
A I would. If there were laughter I would put laughter.
Q Do you use the designation h-a-h?
A Yes.
Q H-a-h?
A Yes.
Q For laughter?
A Yes.
Q Did you do that on any of the transcriptions you made?
A Yes.
Q Think about it a minute.
[429] A Yes, I think so.
Q Those were humorous transcriptions where you put h-a-h, h-a-h, weren't they?
A Again, my personal opinion, Mr. Bouse—.
Q I didn't ask your personal opinion. Did you hear laughter?
MR. DOOLITTLE: I am going to object.

THE COURT: Overruled. No, no, I am sustaining the objection. He has to answer the question.

Q There were transcripts that you made where you designated laughter with h-a-h and h-a-h?

A Right.

Q Do you remember those particular transcriptions involving Thomas R. Kaiser with the laughter?

A Yes.

MR. BOUSE: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

* * * *

[436] Q Mr. White, in response to a question by Mr. Bouse, I believe you testified that where there was laughter you designated it as such, is that correct?

A Yes, sir.

MR. BOUSE: I'll object to that. I don't think that was the testimony.

MR. DOOLITTLE: I think that was specifically the testimony.

THE COURT: Well, I would sustain the objection only as to form.

BY THE COURT:

Q Let me ask you: When you listen to one of these tapes, do you professionally have some designation that you place where you have such a thing as laughter?

A Yes, your Honor.

Q How would you designate—is there a professional term?

A Might I say this, your Honor: If it is a laughter which cannot be described phonetically, there would be a parenthetical note, laughter.

THE COURT: Does everybody know what phoneti-

[437] cally means? All right.

A If it is a laughter such as ha-ha or ho-ho then it is put down that way, phonetically.

Q And if you can't do it, what do you do? If you can't put it down phonetically anywhere—

A Then it's a parenthetical note, laughter.

Q Laughter?

A Yes.

Q What does h-a-h mean?

A That's the sound heh and twice would be heh, heh, which would be—as I say, I can't characterize it, so that's what it sounds like.

Q So that if it was ho-ho, you would put h-o, h-o?

A Yes, your Honor.

THE COURT: All right.

BY MR. DOOLITTLE:

Q And I think—am I correct, that there was such conversation that you did put either ha or ho, if it was ho, or laughter if it was nonphonetic?

A Correct.

Q But, in any event, is it your testimony that your impression is that none of these tapes, that there was [438] anything humorous about it?

MR. BOUSE: I am going to object.

THE COURT: Sustained. Strike it out.

MR. DOOLITTLE: May I be heard?

THE COURT: No.

MR. DOOLITTLE: That was brought out on cross-examination.

THE COURT: No. The jury will disregard any comments by either counsel as to what his interpretation was except what he did as a professional.

In other words, you have not on any of these transcripts in any way, shape or form indicated your opinion as to what interpretation you made of what you were transcribing?

THE WITNESS: No, your Honor.

THE COURT: All right. That's it.

MR. DOOLITTLE: Your Honor, may I just have a portion of Mr. Bouse's cross-examination reread?

THE COURT: I remember it very clearly. I have it in my notes. I have just admonished the jury.

You will understand, members of the jury. Any questions in anybody's mind?

[439] MR. DOOLITTLE: Your Honor, could we approach the bench so I can argue this point?

THE COURT: No. Sit down.

MR. DOOLITTLE: Well, I have no argument, your Honor.

THE COURT: You have an objection. It is on the record.

MR. DOOLITTLE: Well, my objection is worthless.

THE COURT: All right. That's it.

MR. DOOLITTLE: Let me ask one question. May I proceed this way:

Q Do you recall on cross-examination being asked this question by Mr. Bouse—

THE COURT: Objection sustained. I am not going to—I just ruled, I am not going to have another question in reference to that, period. Sit down.

All right. Do you have any other questions?

MR. BOUSE: Just one.

THE COURT: You heard my restriction to Mr. Doolittle. I don't want you to go into that field again.

MR. DOOLITTLE: I have no objection to him going [440] into that field. He went into it once and I didn't object before.

THE COURT: All right. Have a seat.

RECROSS-EXAMINATION

BY MR. BOUSE:

Q Mr. White, how would you designate a snicker?

A By the sound.

Q I mean in your transcription, how would you put it in typewritten form?

A Whatever the sound was.

Q If it was a snicker—do you know what a snicker is? You just heard Mr. Doolittle. How would you put that in your transcription?

A I'd actually—I'd have to hear the noise, Mr. Bouse.

Q The noise that you just heard Mr. Doolittle make, how would you put that in your transcription?

A I don't want to be facetious but if he will make the noise again—

Q He just did, Mr. White.

THE COURT: Strike it out. I don't know if you heard anything, madam and gentlemen. Forget it. In other words—

[441] Q Something that isn't a laugh—I'm sorry, your Honor.

BY THE COURT:

Q In other words, Mr. White, any exclamation or verbalization is put down by yourself phonetically?

A Yes, your Honor.

Q And if you can't make it a phonetical indication you make an indication written to the best of your ability?

A Yes, your Honor.

Q Like noise?

A Right. Like noise or indistinguishable.

Q Or laughter that you can't put down phonetically?

A Yes.

BY MR. BOUSE:

Q If it was a snicker you wouldn't put laughter.

A If it sounded like laughter.

Q No, if it sounded like a snicker and not laughter, you wouldn't put laughter.

A No.

Q But you wouldn't put snicker?

A No.

Q And if it wasn't ho-ho or ha-ha, you probably [442] wouldn't put anything, isn't that so?

A Whatever the sound is, Mr. Bouse.

Q You put whatever the sound is?

A Yes.

Q What other symbols do you use besides ho-ho and ha-ha?

MR. DOOLITTLE: If your Honor please, I think this is beyond the scope of recross-examination.

THE COURT: I will sustain that only as to form. I will ask the question. You have already answered it twice.

BY THE COURT:

Q Phonetically is what? You transcribe anything you can hear by the ears phonetically?

A Yes, your Honor.

Q So whether it is hee-hee or ho-ho or anything else, this is a literal phonetical transcription of what you heard?

A Yes, your Honor.

Q And for what you cannot do phonetically, you make some characterization?

A Yes, your Honor. In other words, I wouldn't just let it go by without making some note.

* * * *

JOSEPH TOZZI, Shield 120, Nassau County Police Department, Assigned to the District Attorney's Office, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Sergeant Tozzi, would you keep your voice up so we can hear you back here?

A Yes, sir.

Q Sergeant Tozzi, you are the commanding officer of the Nassau County District Attorney's Rackets Bureau; is that correct, sir?

A Yes, sir.

Q You have how many detectives under your jurisdiction?

A Nine detectives, two patrolmen.

Q Now, were you the commanding officer of the Nassau County District Attorney's Rackets Bureau back in June, July, September, August—I forgot August—1964, and sometime prior thereto?

A Yes, sir.

Q Were you familiar with the case of the People of [451] the State of New York against Salvatore Granello,

also known as Sally Burns; Dino Conte, also known as Dino Harris; and Thomas R. Kaiser?

A Yes, sir.

Q Did you make various assignments, Sergeant Tozzi, in that particular case pursuant to request of Mr. Norman Levy, the Assistant District Attorney, in charge of the Rackets Bureau?

A I did, sir.

Q Was one of your functions the custodian of tape recordings?

A It was.

Q Will you tell me, sir, where, during that period you kept these tapes and in what manner you kept them?

A They were kept locked in a metal cabinet in my office.

Q Who has the key to that?

A I do, sir.

Q Is that the only key, sir?

A It's the only key.

Q When you go on vacation what, if anything, do you do with that key?

[452] A It's given to my deputy, who is Detective Harold Sheppard.

Q Now, let me show you People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 for Identification and I ask you, sir, to look at these, if you will. Just look at the outside of that.

A Yes, sir.

Q Do you recognize those tapes as being tapes which were part and parcel of the investigation of the case which I mentioned before?

A Yes, sir.

Q Now, were those tapes, when they were not in the custody of some police officer in your particular squad, in that cabinet for which you have the key?

A They were, sir.

Q What would be the procedure in the event that somebody wanted to get one of these particular tapes?

A They would have to come to me. I, in turn, would open the cabinet and give them the tape or tapes requested.

Q When I say "somebody," could anybody just come in and say, "Sergeant Tozzi, give me the tape"?

A No, sir, definitely not. The man assigned to the [453] investigation would be the man that would get it, the man or men.

Q All right, now, will you look at those particular tapes and do you see that there are certain initials on with an X?

A Yes, sir.

Q Is there any significance to that, sir?

A The man that read the tape, yes.

Q The man that read the tape?

A Read the tape.

Q What do you mean by "read the tape"?

A Well, transcribed the tape. I should be more clear.

Q That's also called monitoring?

A Yes, sir.

Q Is it standard procedure that he is to initial that and put an X alongside of it?

A Yes, sir.

Q That indicates that he is the person who had that tape?

A Yes.

Q How would be the only way he could get that tape?

[454] A From me.

Q What would he do? What would be the only way it would get back in that cabinet?

A To me.

Q Fine. What procedure would you use—assume I'm a detective, tell me, specifically, what I would do if I was assigned to read People's Exhibit 1 for Identification.

A He would have to come to me in my office on the second floor. I keep the key on my person, and in my absence, as I said, it goes to my deputy. This cabinet is on top of another cabinet in my office. I have to go to it, unlock it and give him the tape that he has asked for.

Q Now, you open the door?

A Yes, sir.

Q Do you always take the tape out or are there occasions when he takes the tape out?

A I would say that the majority or the large majority of the time I take it out myself.

Q How about returning it to the cabinet?

A Same way, sir.

Q Same procedure?

A Yes, sir.

[455] Q All right, now, are you familiar with the fact that Detective Thomas Costello was assigned to me in September of 1964 to assist me in trying this case?

A Yes, sir.

Q Can you recall that there were occasions when he requested the tapes and got them?

A Yes, sir.

Q Do you know how many times?

A No, no, I couldn't—I don't recall how many times.

Q Since September of 1964, is Detective Costello the only one you have given these tapes to, and he has returned them to you?

A Yes, sir, definitely.

Q Let me ask you this, Detective Sergeant Tozzi: During the time that you were the custodian of these tapes, at any time when they were in your hands, at any time when they were in the cabinet, did you do anything to change, alter, delete, erase, add, amend, change or effect these tapes in any manner whatsoever?

A No, sir.

Q At all times from the time that you initially got these tapes to the time of today, are those tapes in iden-[456] tically the same condition as they were when you first got each and every tape?

A Yes, sir.

Q You did nothing whatsoever, correct, sir?

A No, sir.

MR. DOOLITTLE: No further questions.

For the record, Sergeant Tozzi did not testify before the grand jury, and, accordingly, I have no minutes to give Mr. Bouse.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Sergeant Tozzi, besides being the custodian of the tapes that might be guarded in an investigation, do you also have custody of the wire tap equipment?

A Yes, sir.

Q Is there anyone over you or do you have sole custody of it, you and your men?

A Well, as far as the custody, would you clarify that, sir?

Q Well, that is your primary function, custodian of the reels that may be gathered during an investigation, plus custodial jurisdiction over the wire tap equipment, the recorders, ear phones, all of the paraphernalia.

[457] A The equipment that goes with it, yes, it's in my custody, in my charge.

Q Now, where was it all maintained, Detective?

A Where is it kept?

Q Yes.

A Quite a bit of the equipment is kept in my office. The remainder, which I don't have room for, is in a locked vault in the basement.

Q Do you have anything to do with the purchasing of such equipment?

A The purchasing? I might recommend but the final word is not mine, no, sir.

Q Well, would you be aware at any given time how much money would be spent on such equipment?

A No, sir.

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained, sustained.

Q Well, let me ask you this: Do you know as a fact that the County of Nassau has spent more money on wire tap equipment in the past year than any other county?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

Don't answer the question.

[458] Q Let me ask you this, Detective Tozzi: Do you have anything—

MR. BOUSE: I'll tell Mr. Doolittle the question if he will sit down.

MR. DOOLITTLE: Thank you, Mr. Bouse.

Q Do you have anything to do with the selection of the tapes that would be used in a particular prosecution?

A The selection of the tapes?

Q Yes. In other words, if you were to assign a particular reel to a monitoring for a particular detective, is that right?

A Yes, sir.

Q And you would ask him to note the footage upon which a particular name would arise, for instance?

A All the footage of the different conversations, as a rule.

Q And would you receive back notations from the detective who monitored the reel indicating where, what could be found on the reel?

A The transcription, yes, sir.

Q That's what it boils down to.

Now my question to you is this: Would you know, if [459] it isn't yourself, who makes the selections for the reels that are going to be used in a particular prosecution?

A Well, I do not make the selections. That would go, naturally, to the District Attorney's Office, sir.

Q You have absolutely no concern with the substantive content of a particular reel?

A I have the concern in that I want it promptly and I want it all on there, but mine is not—I don't make the final judgment. It would be the Assistant District Attorney who is handling the case.

Q Now, in this particular case, would you say that—I withdraw that and ask you:

How many reels were held in your custody, relating to this particular case—and I am talking about the Holzman investigation.

A The complete investigation?

Q Yes, the complete investigation.

A I couldn't honestly answer you, sir. I don't know.

Q Well, do you keep any kind of a record of the total number of reels pertinent to a particular investigation?

A Only by the court order number and the amount [460] of reel, or I should say, the reel number on the last box. As a usual procedure, the last box is marked "last reel," and by the number on there you would know how many.

Q Well, having examined Exhibits 1 to 10, marked for Identification, could you tell by looking at any of those boxes how many reels might have been used in the entire investigation?

A No, sir. I couldn't without going through to see if one of them was marked "last reel" as I just explained.

Q Well, you mean to say, Detective, that when someone, a detective, another detective would bring a reel to you to be kept in custody by you, you wouldn't assign a number or something to that reel to indicate it was the number-something reel of a particular investigation?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

Q There is no way then that you could tell now from your records how many reels were used in this particular investigation?

A I would have to go through all the records and tapes and pick up the last reel numbers.

Q Would that be very difficult to do, Detective?

[461] A. Not overly, no, sir.

Q Could you estimate now an approximate number?

A No, sir, I couldn't.

Q Do you know of your own knowledge whether all the reels that were employed in this particular investigation were all monitored?

A Yes, sir, I believe they were.

Q That would be standard procedure, that every reel get monitored?

A Yes, sir.

Q Regardless of how innocuous its contents may appear?

A Every reel is monitored.

Q How many men would you say were assigned to this particular case, who had access to these reels through your office?

A That's difficult without my looking at the initial boxes as to the men that I had monitor them. I assume you mean men that monitored also, not just actively engaged in the case.

Q Well, who may have come to you and requested the reel for certain purposes.

A As an estimate, I would say four or five. I'm not [462] completely sure on that.

Q Can you tell from looking at the particular cartons involved how many times a particular reel was requested for monitoring or replaying?

A No, sir. I don't keep a record of that.

Q Is a record kept when a reel is out and who has it, so that the name may be crossed off when the reel is returned, or something like that?

A No, sir, they have to go through me to get the reels and they are generally back to me the same day. I do remember who I gave them to.

Q You keep it all in your head, who has them and when they come back?

A Yes, sir, to the best of my ability.

Q Did you monitor any of the reels that we are talking about, yourself?

A No, sir, I don't believe I did.

Q Now, when you received the notations from the detective with regard to names and footage, etc., do you do anything with that other than turning it over to the Assistant District Attorney assigned?

A Not as a rule, no, sir. I read it and just turn it over to the District Attorney assigned.

[463] Q I believe you testified, Detective Tozzi—I don't think you testified to this—I withdraw that.

Can you tell by examination of the reels involved whether they were all new tapes?

A Whether they were all new tapes?

Q Yes.

A Not right at this present time, no—well, yes, yes, I could say whether they were all new tapes.

Q Have you examined them?

A I looked at them up here just now. I didn't examine them for that, no, sir.

Q How do you determine whether they are now new or whether they were used and retaped?

A A used tape has a superimposed label on the front of the box. In other words, when you reuse a tape it is magnetically erased and a label is put over the original label.

Q Can you tell by physical examination of the tape itself?

A Of the tape itself? No, sir, I couldn't.

Q In other words, you can look at those tapes and not know whether they had been used or not; you would depend on the label that you'd find on the carton?

[464] A On these—when we take a new tape out, this tape is sealed, the carton is sealed, and there is a piece of cellulose tape on the end of each reel which has to be broken.

Q Yes. So you are relying on the appearance of the carton?

A No, that's not on the carton, sir. That's on the reel itself.

Q On the reel. You can't tell, of course, the recording machine, by looking at the tape, the make, the model, the serial number or any particular recording machine from examination of the reel, can you?

A Not from the reel, from the box. On some boxes—I don't know if these are marked, but on many boxes we do put the machine on the box, an M number for the machine that was used for the recording.

Q Now, the machines, from what you stated previously, the machines would be obtained from your office?

A Yes, sir.

Q Now, do you know how many recording machines were requisitioned from your office in the furtherance of this particular investigation?

[465] A No, not right at the present —

MR. DOOLITTLE: Your Honor, I think that is wholly immaterial.

THE COURT: No, I will allow it. I will allow it.

Q I think you said you couldn't recall?

A I couldn't, no, sir. I couldn't tell you offhand just how many were used.

Q Well, could you estimate the number of tapping setups, tapping equipment?

A I couldn't estimate them. I could know by checking my records, yes, but I would not estimate them.

Q You don't have any such records with you now?

A No, sir, I do not.

Q Do you have any different makes and models or are they all pretty much the same?

A I used two different models.

Q What are they?

A Echo tape and Norelco.

Q And do you know which ones were used in this particular—

A No, I do not know unless they are marked on the box, sir.

[466] Q Can you tell me by examination of the particular tapes involved whether any splices were made, any erasures were made?

A You can definitely tell a splice, yes, sir.

Q You can definitely tell a splice?

A I can tell a splice, yes.

Q Could you definitely tell a splice if the splice was made on the tape and then it was replayed on another tape? Could you tell the splice then?

A That would be very difficult for me, I'm afraid.

* * * *

[471] (A recess was taken.)

(After recess.) [Not in the presence of the Jury]

MR. DOOLITTLE: I will start with People's Exhibit 1. I have given the Court and Br. Bouse a copy of the transcript 1-A, which is the transcript of People's Exhibit 1.

THE COURT: Now, we will follow the exhibits in numerical order.

MR. DOOLITTLE: Right, sir.

THE COURT: And the transcript will be distributed to them as each tape is played.

MR. DOOLITTLE: Right.

THE COURT: All right, let's commence.

* * * *

[477] THE COURT: Before we play that, I forgot to put in the minutes those present in the courtroom and I would like the record to indicate that the Court has taken maximum security measures in that all the doors are locked and there is no question of anyone being able to hear these conversations except the personnel I authorized to be here.

We will note the appearances: Mr. Bouse counsel for [478] Mr. Kaiser; Mr. Warren Doolittle; Detective Costello and—

MR. DOOLITTLE: Thomas Kaiser, the defendant, and Bernard—

MR. SPINDEL: Bernard Spindel, S-p-i-n-d-e-l.

THE COURT: Yes, and Mr. Smith, the court officer; Mr. Gaynor, the court clerk; Frank Dopman and George Mitthauer, court officers.

All right, go ahead.

* * * *

[486] MR. DOOLITTLE: I'll give Mr. Bouse and the Court People's Exhibit 10A for Identification. This is a tape on Patrissy's Restaurant. This is pursuant to the wire tap order.

THE COURT: Do we have an order for this?

MR. DOOLITTLE: This is meter reading 202 to 223, approximately. 10A is the transcript of that particular portion.

THE COURT: Do we have the time on any of these, date-wise?

MR. DOOLITTLE: We only have the date the thing was put on and off. Don't forget, this was an unattended machine, your Honor.

THE COURT: What's the date?

MR. DOOLITTLE: It was taken 7/6/64 and taken off 7/7/64.

THE COURT: All right, let's play it.

MR. DOOLITTLE: We don't know the exact time of [487] any of these calls.

(People's Exhibit 10 for Identification was thereupon played.)

THE COURT: Now what do you have?

MR. DOOLITTLE: The last one.

For the record, this is the wire tap on the Headliner Club.

THE COURT: This is P.E. 11, right?

MR. DOOLITTLE: This is People's Exhibit 9 for Identification.

THE COURT: What was the last one?

MR. BOUSE: 10 was the last one. You took it out of order. It was 8, 10 and now we have 9.

MR. DOOLITTLE: 9A and 9B.

Now, this is the tap on the Headliner Club, and this is a telephone conversation between Dino Conte and Thomas Kaiser.

I'm also going to present to the Court and Mr. Bouse People's Exhibit 9A which is a transcript of People's Exhibit 9, specifically meter reading 137 to 306, and People's Exhibit 9B which is a transcript of meter reading on People's 9 for Identification, approximately 480 and approxi-
[488] mately 818. As in all cases the meter readings are approximate. I put A on top of B, your Honor, so it would make it easier for you. These are long conversations.

Incidentally, for the Court's edification, on A voice number 1 on that will be identified during the trial as that of Thomas Kaiser; voice number two will be that of Dino Conte.

THE COURT: You understand you have to have voice identification?

MR. DOOLITTLE: Yes, but in the absence of the jury, and I'm advising the Court that the People will prove relative to this tape—

THE COURT: I'm saying I have to have voice identification before I can accept it.

MR. DOOLITTLE: Oh, there is no question about it, your Honor. This will not be played until voice identification is in. No question about it.

MR. BOUSE: I think your Honor's point was that before you can consider their admissibility you must have the voice identification.

THE COURT: He understands that. There is no question about it.

MR. BOUSE: Well, then, in no event can your Honor [489] decide the admissibility of the exhibits today.

THE COURT: Well, we'll see what happens. Let's finish these and then we'll take up the question of law.

All right, everybody ready?

MR. DOOLITTLE: Right.

THE COURT: Let's go.

Who is voice two?

MR. DOOLITTLE: Dino Conte.

(People's Exhibit 9 for Identification was thereupon played.)

(The following occurred during the playing of People's Exhibit 9 for Identification:)

THE COURT: All right, hold that a minute.

You say voice two is who?

MR. DOOLITTLE: Conte.

THE COURT: Who is voice one?

MR. DOOLITTLE: Voice one is Kaiser on both of these. He is the one making the call. Voice two is Conte. These will be identified as Dino Conte.

THE COURT: All right, I just want to understand.

(People's Exhibit 9 for Identification was continued.)

* * * *

[490] (People's Exhibit 9 for Identification was completed.)

THE COURT: Now, what is your next step, Mr. Doolittle?

MR. DOOLITTLE: My next step? Nothing at this point. I have witnesses to put on, then I'm going to intro- [491] duce these through Irving Holzman who can identify all the voices, having talked to all of these people previously and he will be able to identify these voices.

MR. BOUSE: Would your Honor at this time entertain any objections?

THE COURT: Oh, yes, sure, I'll listen to what you have to say. But, I'll discuss that other aspect with you, Mr. Doolittle, the identification of the voices.

Mr. DOOLITTLE: Well, may I say this, may I proceed, your Honor?

THE COURT: It has to be done now.

MR. DOOLITTLE: It doesn't have to be done now.

THE COURT: Yes, it does.

MR. DOOLITTLE: Your Honor, let me tell you what my order of proof is going to be. I'm going to produce witnesses who are going to testify to facts which are going to be subject to connection to these particular taps and conversations that were on the tap. That's the only way you can do this.

Then I'm going to put Mr. Holzman on. Mr. Holzman has been in my office. He's familiar with each and every one of these taps having heard them on more than one occasion. He's familiar with the transcript. I'm going [492] to show him the transcript. I'm going to ask him if in my presence he has read these transcripts together with the playing of the tape, can he identify the voices on these, can he identify voice number one, two, voice number A, voice number C.

Now, once he gives an identification of voice number 1, voice number 2, at that point I'm going to offer it into evidence.

THE COURT: Offer what into evidence?

MR. DOOLITTLE: The transcript and the tape.

THE COURT: I'm not going to allow it.

MR. DOOLITTLE: Your Honor, I have laid the foundation.

THE COURT: I'll let you do it this way, if you want to: You are going to have to produce Holzman to identify those voices now?

MR. DOOLITTLE: At this point?

THE COURT: At this point.

MR. DOOLITTLE: Your Honor, I could put Detective Costello on. He's heard all of these voices and he can identify these voices.

THE COURT: Well, do you have any foundation that he knows the voices from before?

MR. DOOLITTLE: Your Honor, at this point, for [493] this preliminary hearing, the purpose of this preliminary hearing was to let Mr. Bouse hear these tapes, to find out if there is anything that was wholly immaterial or irrelevant.

THE COURT: It's not only that. There are one of ten items that has to be laid as a foundation.

MR. DOOLITTLE: Maybe the Court better give me the law you are talking about.

THE COURT: I'll give you the law and let you read the case here.

MR. DOOLITTLE: All right.

THE COURT: First of all, you have to prove that the recording device before I let it in is capable of taking the conversation being offered into evidence.

MR. DOOLITTLE: This I have done.

THE COURT: That the recording is authentic. You have done that. That there were no changes, additions or deletions have been made.

MR. DOOLITTLE: That I have done.

THE COURT: That the recording has been preserved in a manner to be shown to me. You have done that; that the speakers were identified. You haven't done that.

MR. DOOLITTLE: This I will do through Irving [494] Holzman.

THE COURT: No, you have to do that before I let these conversations in.

MR. DOOLITTLE: Your Honor, I'm not going to offer them until Holzman identifies the voices. That's the point.

THE COURT: I know that, but how is he going to identify them?

MR. DOOLITTLE: On the witness stand under oath, the only way that he can do it. In other words, for this particular hearing I'm not going to put a witness who is not under oath and put him under oath just for the purpose of identifying—

THE COURT: Well, I would swear him.

MR. DOOLITTLE: But, your Honor, I'm saying as a Court Officer and with complete good faith and familiarity with my case that Mr. Holzman is going to identify each and every voice, and he's going to—

THE COURT: Prior to?

MR. DOOLITTLE: Prior to the actual playing of the tape.

Now, as I say, mechanically, let's assume that Mr. Holzman is on the stand now, I have gone into certain [495] testimony, and his testimony—

THE COURT: Of course, if you proceed with the actual voice and they are identified—

MR. DOOLITTLE: This is what I'm going to do.

THE COURT: Well, I'm not going to permit any tape playing without any identification of these voices.

MR. DOOLITTLE: Your Honor, I would't even attempt to do that.

THE COURT: Now the second point. We are past that. As long as your order of proof will—well, you'd better read this case before you come to Court tomorrow. This is an Oklahoma Case, but read it, Bashan versus State of Oklahoma by the Court of Criminal Appeals that was decided on May 27th, 1959.

MR. DOOLITTLE: What is the citation, your Honor, on that?

THE COURT: Well, I haven't got the citation here. I just went over it. I think you can run it down through the reports.

MR. DOOLITTLE: Let me see if I have that again, B-a-s-h-a-n against the State of Oklahoma?

THE COURT: Maybe I can get it for you in the morning or maybe after we finish.

[496] Now, the other point—I'm just thinking so you know my thoughts.

MR. DOOLITTLE: Right, right. I want to know your thinking.

THE COURT: It may have been allowed before. I'm not deciding what any other Judge does.

MR. DOOLITTLE: Right.

THE COURT: But when the recording is as all of it isn't as clear, undistorted that I could hear it clear, I don't see any reason for the transcript because I will tell you this: I want you to read that case.

MR. DOOLITTLE: Which one, Bashan against the State of Oklahoma?

THE COURT: And if you get any other cases—and I refer you now to—it's a case in Underhill on Criminal Evidence, in the supplement, paragraph 121—

MR. DOOLITTLE: Wait a minute. Paragraph 121?

THE COURT: Under recordings.

MR. DOOLITTLE: What volume is that?

THE COURT: Volume 1, page 72, paragraph 121.

MR. DOOLITTLE: Your Honor, before—well, may I interject this: I'll admit that these recordings are exceptional for their clarity; however, there are certain por-
[497] tions of these tapes, your Honor—

THE COURT: I'll read you the Bashan decision.

MR. DOOLITTLE: Which I myself have had to run through three or four times to ascertain whether or not what Mr. White had on there was correct. I can play them for you, Judge, and you can get up to that machine and listen to it with earphones five times and you might get it.

THE COURT: Well, in this Bashan Case the decision was that the Court erred in permitting the jury to be provided with the copies of the defendant's tape recorded conversation which was played to the jury and introduced into evidence. It says the recording—of course, I'm not giving it to you verbatim—it states the recording was understandable, and in that case there is no necessity to provide the jury with the typewritten copy.

You see, the fact is if this was not as audible, as distinct as I think it is, I don't want to overemphasize the question of the evidence by giving them a transcript.

MR. DOOLITTLE: Your Honor, I don't think the transcripts are for the purpose of over-emphasizing the
[498] the importance of the evidence. The purpose of the transcript very plainly has been as a guide to the jury.

THE COURT: Only when—I agree with you and I have done this so many times, and you know I have many trials with recordings where there is a question as to what was said or the audibility. Well, here you have a perfect—

MR. BOUSE: You can have the stenographer read it back at any time.

MR. DOOLITTLE: May I ask the Court one thing without trying to be facetious?

THE COURT: Yes.

MR. DOOLITTLE: You tell me, your Honor, I can't put the tapes on until I can have the voice identification? If I do not have transcripts, how could I possibly have

voice identification unless we are turning the tape on and off continuously? This is Mr. Kaiser.

THE COURT: That's why I said I had hoped that you would follow the procedure.

MR. DOOLITTLE: That's exactly what I have done.

THE COURT: To have the identification by the various people which would have been very simple and we would never have gotten into any other aspect.

[499] MR. DOOLITTLE: Your Honor, we haven't gotten into any other aspect. I'm at a complete loss.

May I follow my reasoning up to this point? I have laid my foundation subject to voice identification. This is the only link that is missing at this point.

THE COURT: The foundation is there with the exception of the voice identification.

MR. BOUSE: Does that mean your Honor has decided on materiality?

THE COURT: I haven't come to that yet.

MR. BOUSE: That's part of the foundation.

THE COURT: Well, you make the point. I'm just talking about procedure now, Mr. Bouse. I'll listen to you.

MR. DOOLITTLE: Now, this is what I intended to do: Mr. Holzman is the complainant, he is the victim here, complainant to the extent that he is the victim. He's going to be the People's named witness. There is no question about that, your Honor. He's going to get on the stand, he's going to testify as to certain events that preceded the making of even the first telephone conversation. At that point when we say "Get to the first telephone conversa-[500] tion," I'm frankly going to ask him to look at the transcript and ask him whether or not he heard the tape of this particular transcript in my office, reading this particular transcript. At that point, "Did you identify voices?". "Yes." "Do you know who voice one is?" In this case I think it's Holzman's voice. "Do you know who voice number two is?" "Burns." "Have you talked to Mr. Burns on the telephone before?" "Yes." "Do you recognize his voice? Do you recognize this particular conversation?" "Yes."

At this point, your Honor, I think I have laid the foundation as to voice identification. Then I'm going to offer in not only the tape, but also the transcript.

Now, without the transcript—and I think this is the whole purpose of the transcript, in aid of the jury as a guide to the jury, where voices reoccur if it is only testified to once as to who voice number 1 is, they will know; otherwise, I'm going to have to interrupt after each statement and the witness is going to have to say, "Well, I happen to know that the next voice that is going to speak was Mr. Burns," because the Court has ruled that I can't get it in until it's been identified. So the only practical [501] way you can do it in front of the jury is with transcripts.

I don't know how you ever could get in a taped conversation without transcripts.

I would say this, your Honor; I think this is probably about the fifth case that I have had with tapped conversation, and I frankly would know of no other way to do it other than to stop the machine and say, "Mr. Witness, do you know who is going to talk next? Have you talked to that person on the telephone?"

THE COURT: Your point being that the tone quality of the voice could not be identified by its tone quality alone?

MR. DOOLITTLE: That's right.

THE COURT: In other words, we have just finished this transcript. What you are saying is that unless you look at the one or the two you wouldn't identify—

MR. DOOLITTLE: That's right, there would be no way to proceed with identification.

Mr. White, for example, in his testimony, he didn't know one voice from another. He didn't know whether it was Conte speaking or Holzman speaking or Kaiser.

THE COURT: Per se.

MR DOOLITTLE: Right.

[502] THE COURT: But he would have distinguished the voice being repeated over and over again in a telephone conversation.

MR. DOOLITTLE: Right.

And he, in this transcript, which is merely a guide for the jury for identification purposes and also for such portions of which might come over so quick as to be inaudible as a guide to them—

THE COURT: Well, now, the point is—your only point on the transcript is that identification of the voices is important to you and could be accomplished even though the recording is being played, is that it's essential that the jury have the transcript for the identification of the voices?

MR. DOOLITTLE: Absolutely.

THE COURT: That's your main point?

MR. DOOLITTLE: Right.

THE COURT: What is your argument to the question that giving them the transcript would over-emphasize the importance of the recording itself?

MR. DOOLITTLE: I don't think it does, your Honor. I mean my argument—this is a matter of opinion, the Court has made the statement, I disagree with this state-
[503] ment. I mean this to me is like saying that the picture—

THE COURT: No, I gave you a case that I read to you. I paraphrased it.

MR. DOOLITTLE: Well, I disagree with the Oklahoma Courts if that is the statement.

THE COURT: Well, do you have any decisional law in New York?

MR. DOOLITTLE: No. The only thing I have is experience in doing this, and the problem has not arisen before. I say this, and I will go along with the Court, that the quality of these tapes is unusually good.

THE COURT: No question in my mind. If there is any question that this jury could not listen to that recording and they couldn't make it out, then I will say you had great validity to your argument.

MR. DOOLITTLE: I'll tell you one thing, Judge. For instance, on the last two tapes that I played, if you did not have a transcript in some of those places with that background music, you would have to hear that tape three or four times before that would make any sense.
[504] Now, we have Mr. McGrath here, who is a reporter, and he'll tell you that during these things, you

have to go over them and over them and over them and over them many, many times no matter how audible it is before you get the correct transcription.

THE COURT: All right, now, I'm past that point. You will have to give me a copy of 1 because I'm going to have to pass upon the materiality of a lot of this.

MR. DOOLITTLE: The Court may retain all of the copies of that.

THE COURT: No, I haven't got one, the first one. Now, I'll hear you, Mr. Bouse.

MR. BOUSE: Yes. With regard to—

THE COURT: You heard the argument?

MR. BOUSE: The transcription—

THE COURT: I wanted to get the thinking of the People. I'm not necessarily giving you my opinion. I just wanted to probe Mr. Doolittle's mind to see what his basis was for his offer.

MR. BOUSE: I'm aware, your Honor, of a New York Case that forbids the issuing of a transcript to the jury where the recordings are audible. Obviously, it takes away from the jury the right to interpret the manner, [505] the tone, whatever surrounding circumstances may exist on the tape recording. It then becomes something like secondary evidence where you have best evidence coming in as the recording. But, I'm not as concerned about that particular aspect as I am about the materiality and the probative effect of any of the tape recordings that we have heard.

We have the defendants, Thomas R. Kaiser, who doesn't come into play until tapes 9A and 9B, which, incidentally, were taken out of chronological context. We have Irving Holzman on tape number 10 after the two conversations of Kaiser saying, "I talked it over with my wife and we don't want any partners." That's on tape number 10, which was played prior to 9.

MR. DOOLITTLE: Tape number 10 was Rocky Graziano.

MR. BOUSE: Not 10, the last tape of Holzman.

THE COURT: You say that the conversation that Kaiser had with—I think it's Dino—you say that those two recordings are not material?

MR. BOUSE: Oh, absolutely not, if your Honor please.

THE COURT: Why?

MR. BOUSE: First of all, none of the tapes indicate a conspiracy. We have gone now, I think six days of [506] trial and we haven't come up with anything that looks like a conspiracy. On the other hand, we have Granello saying in tape after tape, "I'm alone. Don't deal with anybody else." He's saying that.

There is a tape where Dino Conte—

THE COURT: Well, Mr. Bouse, I'm not saying per se. I didn't say that per se that the recordings were the conversation of the defendant and Dino spell out a conspiracy. I didn't say that. But, what I said to you, there is no question in your mind as to the admissibility and materiality, is there?

MR. BOUSE: Oh, yes, completely.

THE COURT: On what point?

MR. BOUSE: Because there is no indication on all of the tapes that they are referring to anything with regard to the counts in this indictment, to wit, we got the count of extortion, coercion, two counts of assault and a burglary.

Now there is nothing in any of the tapes referring to those particular things that were supposed to have been entertained as part of a conspiracy upon Irving Holzman. Absolutely nothing. And you have to do an awful lot of gymnastics to get even that close.

[507] THE COURT: I want the record to reveal that I'm giving counsel an opportunity to voice his complete objection to the offer which will eventually be made by the People so that the record could have a complete explanation of his position, because during the trial obviously I would not allow counsel to expound on the law or give me his theory but only to make an objection, and that's why I'm allowing you to do this. But, the admonition to you, if I allow them in, when and if, then if you take an objection that's all you are going to do and nothing else.

Now, I interrupted you. I want you to, for my edification, devote yourself primarily to—I think you have covered—unless you want to say something else, those

two recordings that deal with the recording of Kaiser's voice. You have covered those.

MR. BOUSE: What I prefer to do, if it please your Honor, is to prepare the motion which will ultimately make it shorter tomorrow.

THE COURT: But I want to give you an opportunity to put it on the record so that when and if you take an objection, when and if anything is introduced, that the jury will not hear anything but your objection. But, you [508] are to be protected in this record if there should ever be an Appellate review that you had an opportunity to put on the record everything you want to say. All right.

MR. BOUSE: Yes, I appreciate that.

THE COURT: Anything else you want to add now?

MR. BOUSE: No, but I will reserve any objections to a more formalized review tomorrow morning.

THE COURT: Do you understand what I'm saying?

MR. DOOLITTLE: Yes, your Honor.

THE COURT: That goes for you too.

MR. DOOLITTLE: Yes, your Honor.

THE COURT: During the course of the trial you object, but I don't want any objection or any long dissertation, whether it be on the law or what you think the law is, to be made in front of the jury.

MR. DOOLITTLE: Your Honor, just as a courtesy to Mr. Bouse, I can clear up a factual misapprehension. I recall the testimony. The last one I played was People's Exhibit 9, and he had transcript 9A and 9B. The testimony has been that these conversations were on a tape that was placed sometime between July 3rd—

MR. BOUSE: No, I have that straightened out. I [509] used the wrong number.

MR. DOOLITTLE: The one before that where Irving Holzman hung up was the day before.

MR. BOUSE: Yes, I understand that.

THE COURT: Where is that material, that testimony that involved the bar?

MR. DOOLITTLE: That will be material through the testimony of this witness.

You know, your Honor, let me put it this way: Let's assume that I'm trying to shake you down. Let me give you a for instance. And you and I have a vis-a-vis conversations, therefore I might call you up and you might say, "I won't do it." And I say, "Okay for you," and I slam down the phone. That's all the telephone conversation they say. That telephone conversation out of the context of what you would testify as to what preceded it may not make any sense at all, but together with the testimony of the witness—now, Mr. Holzman is, as I say, going to testify to fill in, there were other things other than telephone conversations. That's my point.

MR. BOUSE: My point, Judge, is that vis-a-vis we don't make a raid by four Puerto Ricans all slamming down the phone. That we don't do.

[510] MR. DOOLITTLE: Mr. Holzman is quite clear as to what happened to his wife on that, and so I think was Sally Burns.

THE COURT: Well, let me say this—

MR. DOOLITTLE: But this will all come out in the testimony, not only from Holzman, but from the other witnesses.

MR. BOUSE: What I'm trying to guard against, your Honor, is these tapes coming in to buttress testimony that has not yet been adduced, and they are coming in under the guise of admission before we prove the actual conspiracy and before we have, in fact, proved the overt acts allegedly in furtherance of the conspiracy, the assault and the burglary.

THE COURT: So far they haven't come in, and you don't know what other testimony is coming yet. But, you see, this type of a case is, of course, a little difficult.

MR. BOUSE: But, it would seem to me—

THE COURT: I think of course the admonitions that I would give to the jury that if in the event there are any declarations by any of the alleged co-conspirators which are in furtherance of the conspiracy and which [511] in the event that a prima facie conspiracy has not been proven, my admonition to the jury of course would be that they are not binding on the other co-conspirators, only when and if they make a factual determination later

on that a conspiracy exists. But I will give that admonition, but if I find in my mind that before the reception of the tapes or the reception of any declarations that there has been a prima facie conspiracy proven, then of course they are admissible. In other words, the procedural step general rule is that you would not allow in declarations of co-conspirators before prima facie a conspiracy had been proven on the very sound ground that maybe an admonition to the jury could not wipe out what they heard. But the nature of the piece being what it is, I'll try to restrict the proof to give to this defendant the maximum protection I can and still have some orderly procedure in the presentation of this evidence.

MR. BOUSE: It would seem to me, your Honor, that that problem would be avoided as far as you are concerned if the proof went chronologically along with proving the burglary, proving the assaults, proving the conspiracy in furtherance of them and then linking up of [512] the defendant with them.

MR. DOOLITTLE: You know, I'm so delighted that he said that. That's exactly what I'm going to do.

MR. BOUSE: Well, after six days it's nice to know what's going to happen.

THE COURT: Let me ask you: You said you had a New York Case.

MR. BOUSE: I'm aware of it. I don't have it now. Closer than Oklahoma.

THE COURT: Well, if you give me that case—my research hasn't reviewed it, but if you have it—

MR. BOUSE: I'll phone it in, as a matter of fact.

THE COURT: You have the case, a New York Case? What level Court? An Appellate Court?

MR. BOUSE: Other than the fact that it's a New York Case.

THE COURT: I would be very happy if you'd give me any other case, any other jurisdiction other than the one I dug up myself. All right.

MR. BOUSE: I'm not as concerned about the transcript as I am about the ultimate admission into evidence of completely innocuous and immaterial items.

THE COURT: Well, you make your objections to it.

[512 A] Tomorrow prepare whatever you think is a proper legal objection so that the record is protected as far as you are concerned.

All right, case adjourned to 10 o'clock tomorrow morning. Bail bond continued.

MR. BOUSE: Thank you.

(The trial thereupon adjourned to Wednesday, June 15th, 1966 at 10 a.m.)

* * * *

[514] THE COURT: For the record, what we have concluded at the present time in the absence of the jury, the Court had an opportunity to hear all the recordings and also, in addition, to review and examine the transcripts which were marked where we had, say, People's Exhibit 1 we would have transcript 1-a and so on in all the offered recordings.

The Court has found that the transcript as marked for identification clearly reflects the recording and the Court has found in the absence, of course, of the jury that the recordings were actually clear, identifiable in tone and substance.

Now, I have offered to you, Mr. Bouse, an opportunity to address yourself to any of the offered exhibits marked for identification so that you could spread on the record at this time any objection and let everything be put on the record. That doesn't necessarily mean that you at the time the offer is actually made when we continue the trial in the presence of the jury, that you still can't make your objection. I want you to. However, I want to af-[515] ford you an opportunity to bring to the attention of the Court any particular motion you wish to make to any particular offered exhibit that is marked for identification at this time. And you, of course, can renew your objection at the time it is offered.

Now, what do you want to do at this time? Do I make myself clear to you?

MR. BOUSE: Yes, you do, your Honor.

THE COURT: All right.

MR. BOUSE: Your Honor, at this time the defendant opposes the admission into evidence of all of the ten exhibits that were marked for identification but will address himself to the—

THE COURT: Well, now, when you say that, we had 1, 2, 3, 4, 5, 6, 7, 8, 10 and 9. Now, you say you object to all these exhibits. Now, what specifically do you object to?

MR. BOUSE: Well, I will have to break them up into three groupings, your Honor. I won't go through each one.

THE COURT: Well, no. Let me have the legal ground. Then you can go into it specifically if you want.

[516] MR. BOUSE: Well, with reference to Exhibits No. 1, 2, 3-b, 4, 5, 6, 7 and 8—

THE COURT: Wait. 1—

MR. BOUSE: 1 to 3-b—

MR. DOOLITTLE: The transcript.

MR. BOUSE: That was the second half of 3.

Well, let me put it this way: All of those exhibits that dealt with conversations between Holzman and Granello —and I think that woud be 1, 2, 3, 3-b, 4, 5, 6, 7 and 8— now the defendant objects to the admission of those in evidence against his as being irrelevant and immaterial in that they do not tend to show a conspiracy with anyone.

Now, I am not discussing whether they show an attempted extortion by Granello or an attempted coercion by Granello. I'm not discussing that. I'm saying they don't tend to show a conspiracy wherein anyone else is working with Granello. And we have on those tapes, specifically on tape—on Exhibit No. 6 that was marked for identification we have Granello saying, "There is nobody else in this picture," or "in the picture." And on Exhibit No. [517] 7 which was marked for identification he says, "I account to nobody."

Now, there is never a mention of the defendant's name in any of the conversations that Granello was having with Holzman.

THE COURT: Wait just a minute.

Everyone is excluded from the courtroom in view of the fact that none of what you are referring to now is in

evidence and everybody is requested to leave this courtroom.

(The courtroom was cleared of all spectators.)

THE COURT: All right. Now lock the door.

All right, go ahead, Mr. Bouse.

MR. BOUSE: Now, as I said, there is never a mention of the defendant's name by Granello to Holzman or even alluding to him vaguely or in any other way.

Now, I think the rule is well settled, your Honor, that once a prima facie case of conspiracy is made out, evidence of the acts and the declarations of each conspirator in furtherance of the common enterprise is against all of them. But, it says once a prima facie case of conspiracy [518] is made out—I refer your Honor to People versus Becker, 215 N.Y. 126. These are all fundamental cases —People versus Donnelly, 253 N.Y. 330 and People versus Lucciano, 277 N.Y.—

THE COURT: How about People versus Donnelly? Did you read that?

MR. BOUSE: People what?

THE COURT: Donnelly.

MR. BOUSE: No, I don't think I did.

THE COURT: Now read it. I will give you the citation later.

Well, on the basis of that, the reception of proof, on that basis I deny it.

What else?

MR. BOUSE: Well, I just want to make a point that if we don't have a prima facie case of a conspiracy we don't have any acts or decarations admissible against anybody except the guy who is doing it, and they are admissible against him personally, Granello, if you want to conclude there were any acts that he did that were unlawful.

[519] Now, the declarations being made by one conspirator and being admissible against all of them, they must be in furtherance.

THE COURT: No question about that.

MR. BOUSE: Now, we don't have any declarations made by the defendant Kaiser in furtherance of anything —or Conte for that matter.

I would like also People versus Ryan, 263 N.Y. 298.

THE COURT: What is the name of that case?

MR. BOUSE: People versus Ryan, 263, N.Y. 298.

THE COURT: What do you say that case says?

MR. BOUSE: Well, that case says any of the declarations or acts committed by one that would be admissible against the others, they must be not only in furtherance of the common enterpirse but before its termination.

Now, the tapes that were introduced with Kaiser and Conte on them are well after the termination of any conspiracy.

THE COURT: Yes. But, you see, you are forgetting one thing. Assume that you say that that conversation is at the termination, ratification, acquiescence between two [520] co-conspirators, even if something has terminated, it is still admissible against each other.

MR. BOUSE: No. If your Honor please, acquiescence—

THE COURT: No, acquiescence or placidity in itself only goes to criminal intent most of the time, but the conversation between Harris and Kaiser could obviously be accepted against each other.

MR. BOUSE: At best, it shows knowledge.

THE COURT: Knowledge and ratification. If you want me to give you the section of that—I think you may find it in Underhill, Volume 1 on criminal evidence. I don't have it here but I can refer you to it so you can be guided a little bit.

MR. BOUSE: There is no evidence revealed in any of these tapes that Granello in fact ever knew Kaiser. Don't forget that he's supposed to be conspiring with him. There is no evidence that they ever knew each other.

THE COURT: Well, your whole argument, Mr. Bouse, as I take it—and I want it to be on the record so of course it shows clearly—is that you don't think that they are material. I overrule that objection, of course with the [521] right that you have to make any general—any specific objection to any part of the tape. Of course, you have that all the time.

MR. BOUSE: I have another ground, your Honor, in that they are not probative of any issue in the indictment.

They don't tend to show the commission of anything. As a matter of fact, Dino on tape 9-b says "he doesn't know that I know you." He is talking about Granello. So here you have it on tapes being admitted. That was on tape 9-b where Dino says to Kaiser "He doesn't know that I know you."

Now, he was supposed to have a conspiracy with Granello and Kaiser and Conte, an dat this late date, July 2nd, one of the co-conspirators allegedly is telling the other one that the third one doesn't know he knows him.

Now, I submit, your Honor, that to admit these tapes into evidence is going to allow the jury to play with things that they shouldn't be allowed to play with because there is no probative effect, there is no materiality as far as the defendant Kaiser is concerned.

I don't argue that they be material against Granello. I [522] don't see how they would be material against Conte. But to show a conspiracy, inasmuch as the theory of the prosecution is that the defendant didn't physically commit any of the acts after the conspiracy, we have to confine ourselves to the conspiracy.

THE COURT: No, Mr. Bouse, I think that listening to the recording as we did-you are talking now about 9-a—

MR. BOUSE: 9-b.

THE COURT: 9-a?

MR. BOUSE: 9-b.

THE COURT: 9-b. I would say that the fair interpretation of that is in its fullest content, in totality. No, it is admissible.

MR. BOUSE: Well—

THE COURT: Of course, now I am ruling on that objection for the record.

Now, is there anything else?

MR. BOUSE: Well, let me say this, your Honor, if I can draw this analogy. If your Honor at the end is going to charge the jury that in any way the evidence—if they find portions of it that are susceptible to two interpreta- [523] tions they are bound to adopt the interpretation that is consistent with innocence.

Now, in your ruling on their admissibility, if you find that you are going to have to charge them that with the subsequent possibility of their ignoring your charge—which is always possible when you have twelve laymen—with that subsequent possibility, it would seem that judicially it would be better not to admit them against the defendant and then you don't have the risk of their not following your charge with regard to two interpretations.

THE COURT: No. My charge, of course, is not going to embody what you say but I will cover the law of conspiracy very clearly. In fact, I will reconcile and take the facts with the principles of laws involved.

No, I overrule your objection.

Now, is there anything else?

MR. BOUSE: Yes. I would like to address myself to the remainder of the exhibits so the record will be clear.

THE COURT: Yes, that's why you are here; to give [524] you an opportunity to do that.

MR. BOUSE: Now, the tape 3-a—No. 3, that was a phone call from Conte to Holzman. Now, there is no materiality, no probativeness or anything. He is asking Holzman to call Granello. Again, here is Kaiser suckered into a situation he knows nothing about with no prior testimony or evidence that he ever could or had anything to do with it. Even if you take his tapes word for word, at best he is a bystander observing a situation that is so vague you couldn't tie it up with whatever Granello was doing together with remarks that were made by Dino. Wel, he goes on his own, he does what he wants to do.

THE COURT: Yes. I have gotten this book—well, now, it was here. If you were to look, Mr. Bouse, I just quoted Underhill to you and I think—I just said to you that I agree that the statements of a conspirator made after a conspiracy had ceased to exist, well, either by success or failure, which is merely narrative of past events, ordinarily is not received against a fellow conspirator. I [525] told you I agree with that part of the principle unless the latter was present and when they were played and heard and heard them and expressly or by implication acquiesced in them. So I refer you to page 799 on Underhill, if you will read paragraph 493.

[526] MR. BOUSE: Well, I don't know, I don't disagree with that, just as your Honor says it. As a matter of fact I don't disagree but in the substance of the tapes themselves you don't have any acquiescence of anything.

THE COURT: Well, that is a matter of interpretation. That is where we differ, where we part.

MR. BOUSE: But you do have solid basis that Dino says that 'Granello doesn't know that I know you."

THE COURT: Your record is clear. You are protected on the record.

MR. BOUSE: Now, may I go to the other tapes?

THE COURT: One by one.

Now as to People's Exhibit 3 for Identification, that was a telephone conversation as I recall it by Harris to Holzman wherein he tells him to call Granello. Well, what do you say is the materiality of that, Mr. Doolittle?

MR. DOOLITTLE: Well, just one of the links in the chain. One of the links of an active part of the conspiracy. In other words, that, coupled with Holzman's testimony, together with Conte's own statements in a conver-[527] sation between him and Kaiser, coupled together with the testimony of other witnesses who identify Conte as being with Granello during portions of this conspiracy, this is highly material.

In other words, I think the jury will very fairly be able to interpret to some extent that this fellow Harris or Conte was part of the conspiracy, sort of a messenger boy and sort of an empoyee of Granello, when all the facts are in, and, accordingly, this testimony is highly material.

THE COURT: All right. On the record I will overrule your objection. What else?

MR. BOUSE: The sum and substance of the tapes with regard to the two of Conte and Kaiser, No. 1, they can't be in furtherance of a conspiracy because they are subsequent to whatever conspiracy might have consisted.

THE COURT: You are talking about the conversation between Conte and who?

MR. BOUSE: Kaiser. No admission because no prima facie case so far that there was a conspiracy, only that Granello might have been trying to extort or coerce [528] money from Holzman.

THE COURT: Overruled, but your objection is there. Anything else, Mr. Bouse?

MR. BOUSE: Now, No. 10, that is just—probably just as far into left field than the others. That is a conversation between Graziano and Granello. Is that supposedly including Kaiser?

THE COURT: What is the materiality of that, Mr. Doolittle.

MR. DOOLITTLE: Well, your Honor, this conversation between Graziano and Granello was made during the course of the conspiracy. Therefore it becomes a statement of one of the co-conspirators.

THE COURT: Who?

MR. DOOLITTLE: Granello.

[529] THE COURT: As to what?

MR. DOOLITTLE: As to what is going to happen to Joey in this case. It is Joey Albino who we will establish was a partner of Irving Holzman and the purpose was going to be—we are going to produce Rocky Graziano as to the conversation that he overheard after this particular telephone call.

Now, I told you I may not even use that telephone call. I may use it only for the purpose of impeaching a witness who may be reluctant to testify to the fact that he did, in fact, meet Graziano. I think it is material.

THE COURT: Decision is reserved on that. It is not being offered as to No. 10, but we heard it anyway.

MR. DOOLITTLE: Right.

THE COURT: The decision is reserved as to No. 10. Mr. Bouse. I am reserving decision on that.

MR. BOUSE: May I say this, your Honor, with regard to all of them, the entire set: to follow Mr. Doolittle's argument, you could have his laundryman, Granello's laundryman call him up and tell him his shirts are starched and Mr. Doolittle will argue those were the [530] shirts or one of them he was going to wear when he met Holzman that night.

I can understand when you have a complete chain, but this a is meaningless chain, and when you have to have links they have to be meaningful. These chains are going in circles. They are all meaningless. You come out where you start, nowhere.

THE COURT: At least you have your position on the record. It doesn't mean that I agree with you but at least you have it on the record.

MR. DOOLITTLE: May I say this, because this may come up pretty soon: I anticipate calling Graziano before I call Hozman, and I may at that time offer this conversation. I draw the Court's attention—I think you have a copy there-on page 2 of People's Exhibit 10-a for Identification where a voice who will be identified as Graziano says "Well, if I'm not there Dino will be there." And it will be established that is Dino Conte or Harris. "I want you to reach—I want you to try and get—try and reach out for Joey. I want to see Joey. Tell Joey he had better come in because it's important."

This conversation may be highly material because it [531] was made during the course of the conspiracy, in furtherance of the conspiracy by one of the co-conspirators, Granello. So, therefore, it may be very material for me to play this and I may offer this before I offer any of the others.

I want to state on the record my reasons.

THE COURT: All right, let's go on. We will continue. I have given you an opportunity Mr. Bouse.

Now, is there any other objection you want to make? Your objections to the tapes are overruled with the right for you to make any specific objections to any particular tape.

MR. BOUSE: Well, we have made them specifically to these tapes as a grouping in that they go nowhere and have no probative force.

THE COURT: Any particular part of any tape? You make any objection to strike any part? Your general objection, of course, is noted and of course I have denied those.

* * * *

[533] RUTH HOLZMAN, 155 Sycamore Drive, Roslyn, New York, called as a witness in behalf of the People, first being duly sworn, testified as follows:

* * * *

DIRECT EXAMINATION

* * * *

BY MR. DOOLITTLE

* * * *

[540] Q Now, let me ask you this, Mrs. Holzman: I ask you to look at the defendant Kaiser. He was not one of the men that you saw there, is that correct?

A No, sir, he was not.

Q I show you People's Exhibit 13 for Identification and People's Exhibit 14 in evidence, and I ask you whether or not you recognize either one of those men as being the persons who were in and around your particular home on this morning that you have described to us.

A No, sir.

Q Have you ever seen those men since that time?

A No.

* * * *

[991] IRVING HOLZMAN, 155 Sycamore Drive, Roslyn, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Holzman, you are married to Ruth Holzman? Is that correct?

A Yes, sir.

Q Your daughter is Mrs. Dolores Billing; is that correct?

A Yes, sir.

* * * *

[995] Q Now, let me ask you this, Mr. Holzman: Have you ever been convicted of a crime, sir?

MR. BOUSE: Objection, if your Honor please. This is—

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

A Yes, sir.

Q Will you tell me when you were convicted of a crime and what crime you were convicted of?

MR. BOUSE: I'll object again, no pertinance, no relevancy.

THE COURT: Overruled.

MR. BOUSE: Well, he's impeaching the credibility of his own witness.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

A I think it was in 1943. I don't remember the month. What else did you ask me?

Q What crime were you convicted of?

A Grand larceny.

Q Can you tell me what if anything you did, sir,
[996] I mean what was the crime itself?

MR. BOUSE: Objection.

THE COURT: I am going to sustain it as to that portion of it, Mr. Doolittle.

Q Were you sentenced on that particular crime?

MR. BOUSE: Objection.

THE COURT: Sustained.

Q Well, let me ask you this: Did you plead guilty to that crime or were you found guilty?

MR. BOUSE: Objection.

THE COURT: Sustained.

Next question.

Q This was back in 1943, is that correct?

A Yes.

Q Other than that, have you ever been convicted of any crime whatsoever?

MR. BOUSE: Objection.

THE COURT: No, overruled.

A No, sir.

Q All right, now, during the months of June, July, of 1964, and for sometime prior thereto, were you a friend of the District Attorney of this county?

A Yes, sir.

[997] MR. BOUSE: Objection, immaterial, irrelevant and incompetent.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

Q Did you ever tell the District Attorney, in June or July of 1964, that you had been convicted of a crime?

MR. BOUSE: Objection, leading and incompetent, irrelevant.

THE COURT: Sustained, sustained.

* * * *

[1079] [Not in the Presence of the Jury]

THE COURT: That is true. Yes. I have now in front of me all that I want as far as the foundation. Let the record show that I will afford you a voir dire which will be limited strictly to voice identification on these exhibits.

MR. BOUSE: I will not be able to examine as to the numbers of conversations?

THE COURT: You can ask that one question as I said you could.

MR. DOOLITTLE: We will go on to People's Exhibit 2 and 2-a for Identification.

THE COURT: I am just wondering which would be the most expeditious way of doing this—

MR. DOOLITTLE: I cannot see any other way because these conversations are going to come in one right after the other.

THE COURT: All right, let us do it this way.

MR. DOOLITTLE: Then we won't have to shuttle the jury in and out and they will be inconvenienced.

THE COURT: Let the record reflect the Court has taken into its estimation a foundation to all the offered exhibits 1 through 10 for Identification, that the only part [1080] of the foundation that I am taking now-in addition to the identification of the voices that was taken before the jury I am now taking in the absence of the jury the voice identification of all the tapes which will be the balance of the foundation that I want prior to my ruling on the admissibility of all exhibits—that is 1 through 10 inclusive, for Identification.

MR. BOUSE: For the record, your Honor, these conversations concern Mayfair 1-1290 and no other phone?

MR. DOOLITTLE: No. The next conversation that I intend to introduce is the conversation of Mayfair 1-8987.

MR. BOUSE: The one we are talking about is Mayfair 1-1290.

MR. DOOLITTLE: That was the last one.

THE COURT: All right. In view of the fact I am taking a foundation and in view of the fact that I have not even ruled on the admissibility of these tapes, the courtroom will be cleared except for the lawyers. Everyone outside except defense counsel, the defendant, Mr. Doolittle, Detective Costello, and that is it.

[1081] Let the record reflect the reason the Court is excluding everyone is that the Court is now taking a foundation for the tapes prior to admitting them, and obviously I haven't ruled on the admittance of the tapes and therefore I am not going to allow anyone else to hear what is in the tapes until I rule on it.

A VOICE: Is this going to be part of the trial record?

THE COURT: Yes, it is. And for the record, I am excluding everyone from the courtroom while the exhibits 1 through 10 for Identification are played in relation to the recordings that were made because the Court wishes to have a voice identification of the voices made. And, since I haven't ruled on the admissibility of the tapes obviously I am not going to let anyone else listen to it. This will preserve for the defendant a trial and it will not expose to any possible publication by any news media matters which have not been allowed in evidence. Gentlemen, you are all excused.

(The courtroom was thereupon cleared of all spectators.)

[1082] MR. DOOLITTLE: For the record, your Honor, I am going to use Mr. Holzman to identify the voices of Dino Conte and Kaiser on the other records.

THE COURT: Yes, you do it all, the voice identification of all your exhibits for identification.

MR. DOOLITTLE: Right.

* * * *

[1097] MR. DOOLITTLE: Now I am going to play the tap that was on the Headline Bar, the conversations between Kaiser and Conte.

THE COURT: All right.

Q Mr. Holzman, prior to July of 1964, had you talked to both Mr. Conte and this defendant, Thomas Kaiser, on the telephone?

A Yes, sir.

Q And could you identify their voices if you heard them?

A Yes, I can.

Q In my office, did I play for you People's Exhibit 9 for Identification, specifically, footage approximately 137 to 306, which is evidenced by People's 9-A for Identification, and during the time I played it did I show you People's Exhibit 9-A for Identification?

A Yes, you did.

Q And did you identify the voices of Thomas Kaiser and Dino Conte on this particular transcription?

A Yes, I did.

[1098] Q Can you tell me whose voice No. 1 is?

A Thomas Kaiser.

Q And who is voice No. 2 on this transcript?

A Dino Conte.

MR. BOUSE: I will object to the foundation thus far, if your Honor please, in regard to Conte and Kaiser. The original question asked by Mr. Doolittle was with regard as to whether the witness had ever spoken to Kaiser and Conte on the phone before.

There was no showing by Mr. Doolittle that he knew that was Conte and Kaiser that he spoke to on the phone before that, that they had any personal conversations and he could recognize by the previous conversations.

THE COURT: Did you subsequently ascertain or have a conversation with Conte and Kaiser?

THE WITNESS: I spoke to Conte when he called my home and told me Sally Burns was waiting for my call and I spoke to Kaiser several times.

THE COURT: Subsequent to that?

THE WITNESS: You mean before this?

MR. DOOLITTLE: Prior.

[1099] THE COURT: Subsequent. I am talking about subsequent to this conversation.

THE WITNESS: I don't understand your question, Judge.

THE COURT: After you say you heard Kaiser speak to you on the recording—

THE WITNESS: He didn't speak to me.

THE COURT: Never spoke to you on the recording?

THE WITNESS: Not on the recording.

BY MR. DOOLITTLE:

Q Did he ever speak to you on any prior occasion?

A Oh, yes.

Q When?

A While we were servicing his equipment in his bar and he has come to my office several times with Robert Luttman.

Q Was that prior to the date of this?

A Yes.

THE COURT: What was the date on that?

MR. DOOLITTLE: That was approximately, your Honor, the 4th of July weekend I think, July 4 weekend of '64.

THE COURT: And you recognized his voice when [1100] you heard it spoken on the recording?

THE WITNESS: Yes, sir.

THE COURT: Your objection is overruled.

MR. BOUSE: I respectfully except.

[A portion of People's Exhibit 9 for Identification was played.]

Q Who said, "Hello" and "what's happening"?

A The voice who said 'Hello" was Conte and "What's happening" was Conte's voice.

Q Did you hear the voice that said, "What's the good word"?

A Yes.

Q Can you identify that voice?

A Thomas Kaiser.

Q You have heard, incidentally, the entire tape, is that correct?

A Yes, sir.

Q "What's the good word," that was spoken by the voice designated on People's Exhibit 9-A as voice No. 1?

A Yes, sir.

Q And, "What's happening," that is designated on People's Exhibit 9-A as voice No. 2?

A Yes, sir.

[1101] THE COURT: Play a little more of it.

[A further portion of People's Exhibit 9 for Identification was played.]

Q The voice that says, "Well, he ranted and raved today," whose voice was that?

A Thomas Kaiser.

Q The voice that said, "He told me—uh, he didn't tell me. He told—uh, Dave come over and, uh, he told us he told the family he was talking to Sally on the phone and he slammed up the phone on him."

Could you identify whose voice that was?

A Thomas Kaiser.

Q That is designated as voice No. 1 on this transcript?

A Yes.

Q The voice that said, "Sally slammed the phone on him"; can you identify that voice?

A Dino Conte.

Q Is that designated as voice No. 2 on this?

A Yes.

THE COURT: All right, the next exhibit.

Q There is a subsequent conversation on this reel, People's Exhibit 9 for Identification, which is designated [1102] by transcript number People's Exhibit 9-B for Identification, and this is footage 480 to approximately 818.

I ask you, Mr. Holzman, if you heard that particular footage with this particular transcript, People's Exhibit 9-B for Identification, in my office on previous occasions.

A Yes, sir, I have.

[1103] Q And hearing this, can you identify who is designated there as voice No. 1?

A Thomas Kaiser.

Q And can you identify who is designated as voice No. 2?

A Dino Conte.

Q I am going to ask you to listen to a portion of this, sir, and see if you can identify these voices.

[People's Exhibit 9 for Identification played.]

Q Who said, "Hello"?
A Dino Conte.
Q Is that designated as voice 2 on this transcript?
A Yes, sir.

[People's Exhibit 9 played.]

Q Did you hear the voice that said, "Oh, it's jammed over here"?
A Yes, sir.
Q Can you identify that voice?
A Tom Kaiser.
Q Is that identified as voice No. 2 on this transcript?
A Yes, sir.

[1104] MR. DOOLITTLE: Do you want to go a little further on this one, your Honor?

THE COURT: No, next exhibit.

* * * *

[1234] [Within the Presence of the Jury]

MR. DOOLITTLE: Your Honor, I would like to have 14 duplicate copies of People's Exhibit 9-A for Identification marked People's Exhibits 9-A1 through 9-A14 inclusive, for identification.

(14 transcripts referred to received and marked People's Exhibits 9-A1 through 9-A14, inclusive, for Identification.)

MR. DOOLITTLE: Your Honor, I would like to have 14 duplicate copies of People's Exhibit 9-B for Identification marked People's Exhibits 9-B1 through 9-B14, inclusive, for identification.

(14 transcripts referred to received and marked People's Exhibits 9-B1 through 9-B14, inclusive for Identification.)

* * * *

[1380] Q Mr. Holzman, I show you People's Exhibit 9-a for Identification and I ask you, sir, if in my office on several occasions you listened to People's Exhibit 9 for Identification, specifically 137 meter reading to approximately 306 meter reading.

A Yes, I did.

Q And just answer this question yes or no, sir: Did you identify the voices who had that conversation reflected on People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306?

A Yes.

Q Let me ask you this: I believe you testified or you said you met Dino Conte on June 4th and thereafter you spoke to him face to face; correct?

A Yes, sir.

Q Thereafter you had a telephone conversation with him where you have identified his voice before this jury; is that correct?

[1381] A Yes, sir.

Q Did you hear the voice of Dino Conte on People's Exhibit 9, meter reading approximately 137 to 306?

THE COURT: Yes or no.

A Yes.

Q Can you identify whether or not Dino Conte's voice is designated on People's Exhibit 9-a for Identification—I will withdraw that.

Prior to July of 1964, had you ever talked to Thomas Kaiser face to face?

A Yes.

Q Had you ever talked to him over the telephone?

A Yes.

Q Will you tell me in regard to what matter.

A Well, when he owned the Imperial Cafe I spoke to him. We also had several conversations after he sold the Imperial Cafe. He was going to go out and find another place of business and asked whether I would back it. I spoke to him about that and I have seen him quite a few times in the company of Bob Luttman, and I spoke to him then.

Q Now, do you know his voice over the telephone?

[1382] A Yes, I do.

Q At the time that you heard People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306, were you able to identify Dino Conte—I'm sorry, Thomas Kaiser's voice on this particular tape?

A Yes, sir.

Q Now, at the time that you heard People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306, did you have in your hand People's Exhibit 9-a for Identification?

A Yes, I did.

Q And was People's Exhibit 9-a for Identification an accurate transcription of the conversation that you heard on People's Exhibit 9 for Identification, meter reading approximate 137 to approximate 306?

A Yes, it was.

Q And can you identify who voice No. 1 is on that transcription?

A Yes, I can.

Q Who is voice No. 1?

A Tom Kaiser.

Q And can you identify who voice No. 2 is?

[1383] A yes, I can.

Q Who is that?

A Dino Conte.

THE COURT: What Tom Kaiser are you referring to?

THE WITNESS: The defendant in this case.

Q Indicating for the record the gentleman sitting next to Mr. Bouse?

A Yes, sir.

MR. DOOLITTLE: Your Honor, at this time I offer into evidence People's Exhibit 9 for Identification, meter reading 137 approximate to 306 approximate.

I also offer into evidence People's Exhibit 9-a for Identification and People's Exhibit 9-a1 through 9-a14, inclusive, for Identification. And I ask that meter reading of People's Exhibit proposed 9 in evidence 137 approximate to 306 approximate be permitted to be played; that the transcripts be given to the jury during the playing and accordingly, your Honor, I am going to offer to Mr. Bouse a copy of this particular transcript, too, of People's Exhibit 9-a.

I ask they be marked in evidence and played.

THE COURT: The offer is being made, Mr. Bouse.

[1384] Any objection?

MR. BOUSE: Yes; incompetent, immaterial and irrelevant; no probative force. I object.

THE COURT: Overruled.
MR. BOUSE: I respectfully except.
THE COURT: Mark them.

(People's Exhibits 9, 9-a, 9-a1 through 9-a14, inclusive, for Identification now received in evidence and marked People's Exhibits 9, 9-a, 9-a1 through 9-a14.)

MR. DOOLITTLE: While this is being handled I would like to have repeated one more question as to the voice identified.
THE COURT: Yes.
Q Who did you say voice No. 1 is on this tape?
A Tom Kaiser.
Q And who did you say voice No. 2 was?
A Dino Conte.
Q And that is the person depicted in this picture I showed you, People's Exhibit 13?
A Yes.
MR. BOUSE: Inasmuch as there are different voices [1385] now on the tapes, I ask that the volume be turned up to a higher degree so that all the vocal intonations can be gotten.
THE COURT: Yes, we will turn it up. And in the event Mr. Bouse or the jury have any question about the audibility, let me know.
JUROR NO. 6: Could you move it back a bit? It blasts you right out of the seat.
THE COURT: Yes. It is blasting Juror No. 6 out of the jury box so we will move it back.

(People's Exhibit 9 in evidence was thereupon played.)

(The following, People's Exhibit 9-a is the transcript of People's Exhibit 9:)

[See Exhibit 9-a, as reproduced herein at page ——]

* * * *

[1404] THE COURT: Go right into the next one.
MR. DOOLITTLE: You want to go right into the next one or do you want to take a break?

THE COURT: No. I'd like to finish the two tapes.

MR. DOOLITTLE: This is a 19-page one. It will be about twenty-five minutes.

THE COURT: Let's go.

BY MR. DOOLITTLE:

Q Now, Mr. Holzman, you told us you have talked to both Mr. Kaiser and Dino Conte before and you could identify their voices; am I correct?

A Yes, sir.

Q In addition to hearing that past meter reading of People's Exhibit 9 in evidence, did you also, in my office, hear on that same reel, People's Exhibit's 9 in evidence, meter reading 480 to 818?

A Yes, sir.

Q At the same time that you heard meter reading 480 to 818 in my office did you have in your possession People's Exhibit 9-b for Identification.

A Yes, sir.

[1405] Q Was People's Exhibit 9-b for Identification an accurate transcription of meter reading approximately 480 to 818?

A Yes, sir.

Q Can you identify whose voice No. 1 is in People's Exhibit 9-b for Identification?

A Yes.

Q Whose voice was that?

A Tom Kaiser.

Q Can you identify whose voice No. 2 is on People's Exhibit 9-b for Identification?

A Yes, sir.

Q Whose voice is that?

A Dino Conte.

MR. DOOLITTLE: Your Honor, at this time I offer into evidence People's Exhibit 9-b for Identification and 9-b1 through 9-b14 inclusive for Identification, and I ask that they be handed to the jury and the jury permitted to hear them. And I'd ask as the jury has them that meter reading 480 approximately to meter reading 818 approximately of People's Exhibit No. 9 in evidence be permitted to be played.

THE COURT: All right, show them to the defense [1406] attorney.

MR. DOOLITTLE: I'm giving a copy, your Honor, of the transcript, People's 9-b, to Mr. Bouse.

THE COURT: Any objection?

MR. BOUSE: Yes, incompetent, irrelevant and immaterial; no probative force.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

THE COURT: Have them marked.

(People's Exhibits 9-b, 9-b1 through 9-b14 for Identification were received in evidence and marked People's Exhibit 9-b, 9-b1 through 9-b14.)

MR. BOUSE: Defendant requests that the second voice be made more audible. I think we all agree that the second voice you lose.

THE COURT: Let me ask the jury: Any trouble at all in the last transmission?

THE JURY: No.

MR. BOUSE: I will withdraw my statement.

THE COURT: Let the record indicate that the jury indicated to the Court that there was no problem at all in the audible reception.

[1407] Mr. Doolittle, just a minute. Come up here.

(There was a conference at the bench not within the hearing of the reporter or the jury.)

THE COURT: All right, have a seat.

Detective, I would like you to—if the manipulation—if the tonal quality of any voice goes down, try to manipulate that so it picks up. I know it is difficult.

DETECTIVE COSTELLO: That's what I'm trying to do. Unfortunately, I can't do it sometimes, your Honor.

THE COURT: Now, members of the jury, at any portion that you find that there is any part that is not audible we'll replay it. But so far you have indicated that everybody heard everything that's been recorded.

MR. DOOLITTLE: Your Honor, this is the one with the music in the background.

THE COURT: All right, we'll play it.

MR. DOOLITTLE: I might explain that at this point.
THE COURT: No, no. you don't have to explain it. Let the jury hear the recording.
[1408] MR. DOOLITTLE: Just let them realize they are going to have to strain their ears on this one.

(People's Exhibit 9 in evidence, meter reading approximately 480 to 818 approximately was thereupon played.)

(The following, People's Exhibit 9-b, is a transcript of People's Exhibit 9.) [Eee Exhibit 9-b, as reproduced herein at page .]

* * * *

[1435]

* * * *

THE COURT: All right, there is one more Let's go.
MR. DOOLITTLE: That's all there is, your Honor.
THE COURT: What?
MR. DOOLITTLE: That is it.
THE COURT: That is the end of them; right?
MR. DOOLITTLE: Right.

* * * *

[1716]

* * * *

(The jury retired from the courtroom and the following occurred in the absence of the jury):

MR. BOUSE: Your Honor, at this time the defendant moves to dismiss the indictment on the grounds that the People have failed to present a prima facia case, and I address myself firstly to the conspiracy.
[1717] The People have failed to make any showing that in fact a conspiracy existed. We have the testimony of Granello as presented through the tape recordings that on numerous occasions he made the remark that there was no one in this with him, that he was in this alone, that he accounted to nobody.
We do have other remarks that "the people I am with are animals." He has the remark in there—something about letting the animals loose, but there is no showing that he in fact was ever in a conspiracy with anyone

to further the crimes of attempted extortion and coercion which are cited as counts in the indictment.

THE COURT: Now, just a minute. You just deviated for a minute. You were talking about the count of conspiracy. Now you went into the coercion.

MR. BOUSE: I am talking about all of these counts because, of necessity, they are related. When I talk of the conspiracy I have to, of necessity, relate myself to all the counts because there is no claim that the defendant physically or actually engaged in any of the other counts.

Now, he did state in his tapes that he was paying [1718] others at times. He was going to have to pay others off. And I think the testimony from the witness Holzman this morning indicated that the thing was that he was to get $25,000 and then $12,500 from the witness Holzman in order to pay off members of the family. I think your Honor can take judicial notice that the family indicates Cosa Nostra family, and the two people he is talking about in this indictment, Conte and Kaiser, one in a Greek and the other is German. I think that should be taken notice of. But, he is talking about paying off the family.

Nowhere in the entire testimony or any of the tapes is there mentioned the name of the defendant Thomas R. Kaiser as one of the co-conspirators. And, as a matter of fact, the witness Holzman testified this morning that, number one, he never had an argument or a fight of any sort with Kaiser. Number two, never knew of his own knowledge that Kaiser knew Granello and, number three, that Kaiser never mentioned Granello to him.

Now, there is a complete dearth and a lack of evidence [1719] to show, number one, a conspiracy and that if there was one that Kaiser was ever connected with it.

Now, there is no showing ever that a conspiracy to commit the burglary and the two assault charges that are named in the indictment existed. What we have is evidence to indicate that Granello hears about the burglary coming from Greenwood Lake, communicates with Holzman and tells Hozman "If you had been with me this wouldn't have happened."

Now, there is no question about the fact that the People have put in I think a prima facie case against Granello as an individual to the attempted extortion and the coercion. I think they have done that. If you read between the lines—and you don't have to read too far between the lines into the thing—I think that is indicated in the tapes. He is smooth and he is suave and as suave as Mulberry Street gets, but I think that is indicated in the tapes that he has tried to extort and to coerce, and I think he has done this. I think he has made himself or I think he has made a situation or tried to [1720] make a situation work for himself.

The burglary occurred and it came at a prime time. He tried to use the burglary to forward his own end. No question in my mind that that was the intent of Granello throughout the entire situation, but there is absoutely no no showing on the part of the People that this was an intent among several people, particularly the defendant. This was a unilateral thing. If you listen carefully to the tapes of Dino and Conte—

THE COURT: Dino and Conte?

MR. BOUSE: I'm sorry.—Dino Conte and Kaiser, you will note that Conte says on a number of occasions "What can you do with the man?" He further says, "It was badly handled. The whole situation was badly handled."

Now, these remarks, if you want to take them at their worst, are admissions of a conspiracy that has not been proved.

THE COURT: What do you say it was? What about the conspiracy?

MR. BOUSE: These are at their worst—if you want [1721] to take the worst possible interpretation of these remarks of Conte you would say that these are admissions of a conspiracy. But, there was no showing of a conspiracy. Therefore, there is no corroboration for any admissions.

Now, these are not statements from Kaiser you will understand. Kaiser is Conte's friend. He is talking to Conte. They are gossiping about what is happening to Holzman and Granello, but absolutely there is no talking

about anything that they knew before it happened. In other words, there is no discussion.

THE COURT: Let me ask you this, Mr. Bouse. We get down to the tape, and I would like to have your thought on this, the tape between Dino Conte and the defendant. What do you say about the question of knowledge even though there is no active participation? Say there is no active participation shown by the defendant. Suppose we have knowledge and maybe an expressed or maybe an implied ratification.

MR. BOUSE: Acquiescience?

THE COURT: Or acquiescence between the defend-
[1722] ant and Granello. Isn't the defendant in your estimation, in your legal values, bound by the statements of the alleged co-conspirator Granello?

MR. BOUSE: Oh, no.

THE COURT: Why not?

MR. BOUSE: I would say this: First of all, assuming knowledge and acquiescience of what was happening, there is absolutely no evidence that the defendant ever knew Granello. We have Rocky Graziano, a friend of Granello's for forty years, who said he never saw the defendant. There is absolutely no evidence that Granello and this man ever knew each other. The only knowledge and acquiescience you can have is the defendant talking to Conte and Conte having knowledge and acquiescence of what was happening. But, the defendant is too far removed from the situation to have any acquiescence in it. He may know something is happening, and all of the tapes indicate that he knows it after it happened.

THE COURT: I get your point. Your point is that the tape embodying the conversation between Dino Conte and the defendant you say contains nothing to link this defendant with this conspiracy and, of necessity, because
[1723] there is no linkage there even though there is the allegation of aiding and abetting, if that falls everything else falls.

MR. BOUSE: I say this: Further than that that there is no showing of any overt act that was committed by anybody, any of the defendants named in this indictment, against Holzman or any member of his family.

There has been no linking up of the burglary to the defendant Granello or to anybody. No linking up of this mysterious phone call that Dolores Billing got with anybody—Granello or the defendant, and certainly not the defendant. There has been no identification of the defendant together with any overt act that has been claimed in the first count of the indictment.

THE COURT: Ye know that, and I hope you don't press strongly from a legal standpoint that there actually must be his physical presence.

MR. BOUSE: Of course not.

THE COURT: We are talking about aiding and abetting.

MR. BOUSE: An overt act in furthermore of the [1724] conspiracy.

THE COURT: Well, on the overt act it could be done by somedoby else. If he is involved in the conspiracy, obviously—

MR. BOUSE: A conversation in furtherance of the conspiracy, if your Honor please, is an overt act. But, there has been no showing that there has been any conversation in furtherance of a conspiracy. The only two exhibits I think are 9-a and 9-b that the People have offered as far as this particular case is concerned only show two conversations between Dino Conte and Thomas Kaiser referring to past things—"He ranted and raved today. He's as mad as a wet hen. He's terrified." Kaiser said that. He said, "That's no way to treat the man."

This is not only not in furtherance of a conspiracy but there is a definite criticism of the manner in which Granello is seeking to muscle in on Holzman's business.

THE COURT: All right. Anything else?

MR. BOUSE: Excuse me?

THE COURT: Any other argument?

[1725] MR. BOUSE: No, that is the sum and substance; no proof of a conspiracy exists, but that Granello acted on his own and took advantage of his situation and tried to take advantage of it and said that if Holzman had been with him the situation wouldn't have occurred, and he tried to force him—and then talks about unleashing people and all that jazz. But, absolutely no showing he

ever was in fact with anybody in attempting to extort or coerce Holzman, and there was no showing that there was any linking him with the defendant Kaiser.

Every witness—and these are prosecution witnesses—Graziano says he knows Granello for forty years but he never seen the defendant, and Holzman also says he never knew that this man knew Granello. You cannot have a conspiracy unless you can show they at least know each other.

THE COURT: Well, Mr. Doolittle, what do you say about that? I want you to concern yourself with Exhibit 9-a and 9-b.

I want to know what is contained in those exhibits in that conversation that ties this defendant in.

[1726] MR. DOOLITTLE: Absolutely an unqualified admission by this defendant to his friend Dino Conte as to what part he in fact played in this thing.

THE COURT: What part do you say? What do you say is in that exhibit that shows that?

MR. DOOLITTLE: He was the source of the information in this particular thing. He specifically says in Exhibit 9-a that if Sally Burns had done it the way he had suggested it—meaning he, Kaiser—if Burns had taken his advice it would have been over with by now, the whole thing would have worked out, but instead he goes on to criticize how Sally Burns fouled up the whole thing because he didn't take his advice.

Certainly in this conversation alone—

THE COURT: In other words, we both agree that mere knowledge by this man—

MR. DOOLITTLE: This is an admission, your Honor, by a person who is a co-conspirator.

THE COURT: No. Mere knowledge that others were involved in some criminal scheme does not necessarily permit the declaration or acts of others to be received against him. It is only when there is knowledge or [1727] active participation or expressed or implied ratification can the acts or declarations of one co-conspirator be binding on the others.

MR. DOOLITTLE: I have a direct quote.

THE COURT: Tell me where in 9-a it contains declarations that bind this man.

MR. DOOLITTLE: I will start reading them off. This was going to be part of my summation. I say if the Court will read Extibit 9-a—I can give you some excerpts.

THE COURT: Direct me to the pages that you say ties him in. I think you had better have your summation right now.

MR. DOOLITTLE: O.K.

They are talking about the fact that Holzman—

MR. BOUSE: What page?

MR. DOOLITTLE: Page 6. Prior to this they are talking about the fact that Holzman knew that it was Sally Burns—and we have the quote in the middle of the page where Kaiser is speaking—"I knew the fucking man knew this all along. This I knew right along. I told you that. There's no question about it. He knew I was telling [1728] him things that was going on."

Then talking about Sally Burns—"No, he didn't mean you."

"Sure he meant me."

"No, he didn't mean you."

"Well, who did he mean?"

"No.—he—I don't know. He didn't mean you."

"Huh?"

"He didn't mean you."

"He didn't mean me that was telling the—"

"No."

"—information?"

"No."

"Well, who did he mean?"

"Well, he doesn't, he didn't mean that information there."

THE COURT: What do you say that does?

MR. DOOLITTLE: I say that is an absolute admission that this man was part of the conspiracy and that he was conveying personal information on to Holzman.

Now, at the bottom of page 7: "I told you this from the beginning that it was—I told you what, what should [1729] have been fucking done in the beginning. If it would have been handled the way I told you in the fucking

beginning, it would have been done and it would have been over with now."

This is Kaiser talking.

"Well, it's—forget about it."

And, you know, it is significantly enough that throughout 9-a Kaiser says to forget about it—I mean Conte says forget about it and Kaiser won't forget about it. He keeps saying after that, where Conte says forget about it, "First he wanted $5,000. Then he wanted $25,000. Then he wanted twelve-five. He was fucking ranting and raving. He was fucking ranting and raving." He is criticizing Sally Burns and that refers to the previous paragraph where he said if he had done it the way he told him it would have been over with.

[1730] Now to go on, they continue on about Holzman would have to be a moron and in the middle of the page, "You know the way this man came out with things. You know, he came out with things the wrong way, Dino."

This is referring to Burns again, in context with the statement, "You know, he came out with things the wrong way, Dino. I told you that."

Anl then Conte says, "Well, listen, you can't tell him what to do," and Kaiser interrupts again and says, "Well, I mean, I told him things and he went over there and he said it word for word practically. He said it word for word. He said it word for word about Joey. He said about that fucking broad in the Copa, instead of bringing in the fucking situation with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to."

Let me stop right there, your Honor. He told Sally Burns to bring in about an outside element. Maybe Sally Burns never did tell him that Sally Burns in fact did bring in a situation about an outside element. It was [1731] Sally Burns who told Mr. Holzman that there are other people involved, that we got to buy off other people. This was his idea. He says so himself (indicating).

Now, he goes on, "And he was, you know, to straighten it out, instead of just walking in there and, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last."

Now this is an admission by him that he had the idea originally. This certainly is an admission that this jury can consider.

Let me go on and this is a classic, on page 9:

"Naw, it is a dead issue now." This is Conte again saying, "Let's bury this thing, let's forget it," but not Mr. Kaiser. He started the ball rolling, he said, "Well, what I would do is maybe wait a month." If the jury can hear that and not say that is not an admission and not say this man is a co-conspirator, this is their county but I say, certainly, beyond any reasonable doubt at this point, uncontradicted, just what I have read now and I haven't gone into 9-B where they talk about getting another victim— .

MR. BOUSE: First of all, let's take care of 9-A, [1732] may I?

THE COURT: Just a minute. Wait until he finishes.

MR. DOOLITTLE: "The fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly."

Now on page 10: "I brought, I brought the man over a fucking shot for you and for him, so, I mean, there's nothing to say that, uh, that, uh, what I did was, uh, inaccurate or I did things stupid. So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong."

Now, if your Honor please, if this is not in the nature of an admission, I don't know what it is, and I state unequivocally, your Honor, that Mr. Holzman never realized this man was a co-conspirator. He never in fact realized that this man probably dreamed up this idea until he heard this tape.

There was no testimony by Holzman about Kaiser other than the fact that he knew him and could recognize his voice over the phone.

THE COURT: All right, I will let you answer that, Mr. Bouse.

[1733] MR. BOUSE: Yes, your Honor. When he is talking about he was ranting and raving, he is talking

about Holzman. For one year Kaiser knows Holzman. They have seen each other regularly..

THE COURT: What page?

MR. BOUSE: I am talking about page 8. Holzman has financed Kaiser and when he says Holzman is ranting and raving, this is information he is getting from Bob Luttman and he is passing it on to Conte and he is talking to Conte about the things. He says, "You know the way this man came out with things. You know, he came out with things the wrong way, Dino. I told you that."

He's talking about "I gave you information, Dino, and you pass it on to Granello and Granello starts terrorizing the man. That's not right." That's what Kaiser is saying throughout the situation and when he's talking about bringing in an outside element, he is talking about the shylock. He said, "Instead of bringing in the fucking situation with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to," that was for money. That was his [1734] advice to Conte to get to Granello, "Get yourself a shylock and get the money and borrow it and pay exhorbitant interest. Don't try to shake down Holzman."

That's the information he is giving to him. That is not only not an admission, a negation that he ever agreed with anything else and when he says, "Let's take a shot next month," he means take a shot at the business situation. He says, "If you want to get Granello, your boss or whoever he is, in with Holzman, wait until Granello has been done with Holzman to quiet down because he has terrified the man."

He says, "Yeah, well, it wasn't handled by me badly." In other words, he did nothing to terrify the man. "I didn't do anything to conspire against him." and he says a shot for you and for him.

THE COURT: Well, all right. I am going to take a few minutes. I will read both 9-A and 9-B. That is what you are offering, Mr. Doolittle, for me?

MR. DOOLITTLE: 9-A.

THE COURT: That is the crux?

MR. DOOLITTLE: That, coupled, of course, with the [1735] entire testimony.

THE COURT: Yes, but you both agree that the case falls or rises on the conversation between Dino Conte and Tom Kaiser.

MR. DOOLITTLE: Together with all the other evidence.

MR. BOUSE: With this further fact, that if you took 9-A and 9-B at their worst interpretation, at best, for the prosecution you would have admissions of a conspiracy that was never proved in the first place and therefore you would have absolutely no corroboration of any of the admissions, if you want to construe them as admissions. They are certainly not acts in furtherance of everything because everything has happened by this time, so at best, they would be admissions of something that hasn't been proved and therefore no corroboration for their existence.

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[1736]

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THE COURT: Decision is reserved until tomorrow morning.

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[1738]

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(The following occurred in the absence of the Jury:)

THE CLERK: People versus Thomas R. Kaiser. Case continued.

THE COURT: Mr. Bouse, on the basis of the Court's examination of all the exhibits and all the testimony, your motion is denied.

MR. BOUSE: I respectfully except.

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[2471]

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MR. BOUSE: Defendant rests.

THE COURT: People rest?

MR. DOOLITTLE: The People will rest, your Honor.

THE COURT: All right.

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[2473] [The following occurred in the absence of the jury:]

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THE COURT: All right, are there any motions, Mr. Bouse?

MR. BOUSE: Yes, if your Honor pleases. The defendant, at this time, respectfully moves for a directed verdict of acquittal on the following grounds: No. 1, that the charges contained in the indictment, to wit, the two charges of assault—

THE COURT: You are asking for a directed verdict?

MR. BOUSE: Yes, of acquittal and I am referring to the entire indictment, but I am referring specifically to the charges contained in the fourth, fifth and sixth counts. Those are two charges of assault in the second degree and one charge of burglary in the third degree, I believe.

THE COURT: Now, just a minute. What were those counts?

MR. BOUSE: The fourth, fifth and sixth counts. [2474] Those are two charges of assault in the second degree and one charge of burglary, I believe, in the second degree.

Now, if your Honor please, the defendant submits that there has not been one iota or scintilla of evidence to connect those particular incidents, without arguing whether they happened or not, and the defendant for the purpose of this motion readily concedes they happened but no evidence, not one scintilla of evidence which connects Granello with those particular incidents.

No question about the fact that you can certainly glean from his conversations with Holzman that he intended to use those incidents in an effort to shake down Holzman, no question about that, but not that he caused them in those three counts, that the defendant is accused of being a co-conspirator of Granello, in promoting these three things that happened, the assaults and the burglary, there is no evidence of Grenello being connected with them, having happened, let alone any evidence to connect the fact that the defendant did anything in furtherance of those things.

[2475] In regard to the count of conspiracy and the attempted extortion, there is absolutely no evidence that the defendant ever collaborated with Granello, with the attempted extortion or conspiracy, against Holzman.

The defendant doesn't argue that what started out as a slight shake-down may well have become an attempted extortion and a coercion by Granello, but he is strenuously arguing that there is not one scintilla of evidence to indicate in any way, manner, shape or from that he was ever connected with it.

Now, the only one that could have explained those tapes and prior to his having taken the stand, the defendant readily admits there is no explanation for the contents of the two tape recordings between Conte and Kaiser, no explanation, and the only person who could have explained what he meant and intended in that conversation was the defendant, who has gotten on the stand, has been subjected to cross-examination and had explained it. Now the defendant submits that at this stage there is no question of fact to go to that jury on.

The explanation has been made for the tapes. They [2476] only consist of admissions because the prosecution readily admits that the tapes were, if anything, were not in the form of admissions, so the admissions having been explained as not being admissions, there has been no other evidence, if they were admissions, to corroborate them as admissions.

No evidence, in fact, that there was a conspiracy or, No. 2, that the defendant was connected with it; so if your Honor pleases, the defendant respectfully submits that at this stage of the trial there exists no question of fact for a jury's consideration and no evidence upon which they could go either way in assessing the guilt or a reasonable doubt as to the guilt of the defendant.

THE COURT: All right. Mr. Doolittle, as to the fourth, fifth ad sixth counts, what have you got to say?

MR. DOOLITTLE: As to the fourth, fifth and sixth counts—

THE COURT: The two assaults and the burglary; you tell me what connects.

MR. DOOLITTLE: I definitely say that Sally Burns—

[2477] THE COURT: Specifically; tell me.

MR. DOOLITTLE: These things are all tied in through Granello and, your Honor, the Court has heard these tapes. I say that Granello has admitted his part in this and this is part of the conspiracy.

He keeps telling Mr. Holzman, "Look, Irving, there is going to be worse things than this if you don't go along"; and further, says; "If you had come down on Friday I could have stopped this."

Now, this coupled with the fact of the admissions on the part of these two defendants, saying, "Sally did it all by himself, Sally did it all by himself, Holzman would have been a fool not to know that it was just Sally himself, instead of other people," these two facts, the fact that Burns continuously talks about these things in regard to the telephone calls or the telephone call to his daughter, he keeps saying, "Irving there is going to be worse things than that"—

THE COURT: What he is saying, he is not denying that there is an oblique reference, but he says, what Mr. Bouse says, he wants to know what you feel or the people [2478] feel is the direct, because I understand your argument is that Mr. Granello, when he talked about the fact that if he hadn't gone to Greenwood Lake it wouldn't have happened and that is your main point?

MR. DOOLITTLE: Right.

THE COURT: Anything else?

MR. DOOLITTLE: This coupled with, Granello's threats at the end, "You listen to me now, you'll see a fury that you never saw in your life."

This, certainly, is a part of this conspiracy where he adopts all the acts and, certainly, implicit, an absolute admission of the burglary, and the telephone calls were all part and parcel of his doing this, coupled with the fact of the statement that he makes specifically on the tapes.

THE COURT: All right. 2 o'clock, gentlemen.

MR. DOOLITTLE: It is a question of fact for the jury.

THE COURT: Decision is reserved. 2 o'clock.

[A luncheon recess was taken.]

[2479] AFTERNOON SESSION

(The following occurred in the absence of the jury:)

THE COURT: Your motion is denied in all respects.
MR. BOUSE: I respectfully except.

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[2537]

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THE COURT: All right, Mr. Doolittle.

(Mr. Doolittle summed up to the jury on behalf of the People as follows:)

[2547]

* * * *

Now you saw Mr. Kaiser up there and I complimented him, I said, "Mr. Kaiser, you are an extremely intelligent and articulate man" and I think after looking at him you saw that he handles himself very well. He knows it, a man particularly fouled up by the use of pronouns. We are going to get to that when we discuss his testimony and specifically not when I take it out of context, but when I talk about his entire conversation with Dino Conte which I say to you goes even further than being an admission, which I say to you, were this said to a police officer, would be an absolute, absolute confession as to his part and parcel in this conspiracy as to the fact that he was the [2548] idea man but you don't even have to question here, you don't have to question that it was made to a policeman, but you have a competely voluntarily made statement, made to another co-conspirator which brings this man in. This isn't what I say, this is what Kaiser says.

* * * *

[2566]

* * * *

Here he brings in the outside element again and we know it was him and him alone because his two co-conspirators, discussed it and as he put it, "You know, Holzman would have to be a fucking moron not to surmise what was going on." He gave you an explanation for that and it goes straight in conflict in the face of logic

and good sense and in a context in which that statement was made. The same conversation on July 1st, "Irving, I'm worried myself. I'll tell you the truth, I'm going to be truthful. I'm worried myself. I'm worried about you, Irving. You won't come across." Is that the only logical conclusion that can be drawn from that conversation?

He says, "But Irving, I know that. And I want to eliminate all the bullshit. And I told you, let's do it once and for all. Now I don't know why we are going through all of this. It's ridiculous. It's ridiculous. It's ridiculous. And it's only going to be a worse situation and go where the hell you want." A threat? You bet your life it is a threat and these words all are spoken by Mr. Granello and although they are spoken by Mr. Granello are the words of this co-conspirator, Thomas Kaiser, because on Exhibit [2567] 9A and 9B he confessed to that and the only thing he didn't realize that it would be broadcast to a jury of twelve of his peers.

* * * *

[2580]

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He explains this is really a suggestion that they get lawyers and go to Court. This is not a civil matter. This is a criminal matter. A quote from Mr. Kaiser talking to Mr. Conte, "don't you see the fucking game this guy plays? I told you this from the beginning. I told you what should have been fucking done in the beginning. If it would have been handled the way I told you in the fucking beginning, it would have been done and would have ben over with."

He goes to explain things and this like I say is like a signed confession that he was the idea man. "You know the way this man came out with things." And he said he was referring to Sally Burns,—"you know he came out with things the wrong way. I told you that," and he [2583] admits it. Why does he admit? Because they thought this tape would never be played to twelve people and he had no idea of course that this was being tapped.

Then he says, "As long as he don't think there was anything stupid that was done through us, that's all. That;s the only thing, you know. I don't want him to

thing that the stupid things were done through us. It wasn't. Everything was accurate" and then Conte goes on and says, "Look, if I couldn't handle it it was my fault" and he was quoting Sally Burns.

Then he tells you this, "I know some other people interested in this guy", and he tells that this was the Federal Government or something like that. Then he says, "Maybe they'll be successful if they make a right move." Was that shake-down talk? You bet your life it is, just like the deadly humor, you know, that he talked about, called it a joke and yet he said there wasn't one humorous conversation in that 9A and there wasn't anything humorous. It was tragic.

Now the same weekend conversation about a victim. You have heard it. You have heard it and you have heard it was said as a joke, in a jocular vein. It was said in a jocular vein, half truth and half funny—"Find a victim [2584] for me". He says, "now we lost Holzman so now we have to find another victim" and you know Conte is saing this in sort of—"We lost Holzman. Now we have to find another victim" and then he says and you listen to this on the tape, "Well, we'll see what else comes up." That implies that they did lose Holzman. That's the plain word meaning. That's an admission, a confession.

* * * *

[2593]

* * * *

I say to you there are six counts. I can't tell you what to return with. I say to you that the evidence shows beyond any reasonable doubt that the defendant is guilty of conspiracy and as such is guilty of the attempted extortion and as a co-conspirator is guilty of the assault, the burglary and the coercion. The acts of Granello are the acts of Kaiser. You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's Exhibit 9A and 9B by this defendant, Thomas Kaiser.

I ask you to listen attentively to the law. I ask you to deliberate. Don't guess. If you have any questions about any of the tapes, please come back and have them reread

and all I can say is thank you, God speed to you to a just and true verdict.

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[2596]

* * * *

(The following occurred in the absence of the jury:)

THE CLERK: People versus Thomas R. Kaiser. Case continued.

THE COURT: All right. Now, I understand you want to make a motion first.

MR. BOUSE: Yes, if it please the Court.

[2597] THE COURT: Just a minute.

Yes, Mr. Bouse?

MR. BOUSE: Yes. If it please the Court, the defendant moves for the withdrawal of a juror based upon the inflammatory and prejudicial remarks of the assistant district attorney on his summation yesterday, and with particular reference to the characterizing of the defendant as the "idea man" wherein there was no evidence that he came up with any idea that anybody took; and, secondly, with reference to the transcripts of the two conversations as confessions which, of course, is taking away from the jury their right to evaluate the wording of the transcripts.

THE COURT: You didn't object.

MR. BOUSE: I didn't want to in front of the jury nor for the withdrawal of a juror in front of the jury. That could have been very prejudicial to the defendant.

THE COURT: Well, I waited for an objection from you and you didn't make any.

MR. BOUSE: I didn't want to do it in front of the [2598] jury. As I say, a motion for a withdrawal of a juror at this stage of the trial could have a disasterous effect.

THE COURT: No. In view of the fact, number one, that no objection was taken, it was repeated twice I know—

MR. BOUSE: And taken in cumulatively with the many other prejudicial things that occurred during the trial. Your Honor will recall the examination of—

THE COURT: What do you have to say about that, Mr. Doolittle? You equated the admission with a signed confession.

MR. DOOLITTLE: Absolutely. And I think that was fair comment. I can draw a logical inference from the evidence and I maintain that the conversation has the same force and effect as an absolute confession.

Your Honor, this is my contention: I can't see where this is prejudicial. If the Judge wants to withdraw a juror you will do so over my objection. I say it is abso- [2599] lutely a fair comment. Of course, the discretion is up to the jury as to what weight they want to give that particular statement, but I say the nature of what Kaiser said in those two conversations is an absolute unqualified confession as to his part and parcel in the deal.

MR. BOUSE: I think irreparable harm has been done this defendant and this jury is going to go away from here thinking in fact a confession was made, and half of the job is done against the defendant at that point.

MR. DOOLITTLE: I know of no rule that says for the thing to be a confession it must be given to a police officer.

THE COURT: Well, you know the difference between an admission and a confession. A confession is an expressed acknowledgement of guilt where an admission is some testimony as to material fact which is to be taken into consideration with the evaluation of all other evidence. Now, you are not telling me you don't know that.

MR. DOOLITTLE: I'm saying this was the nature of an absolute confession. "If you did it the way I told you to do, if you done it this way and done it that way," this [2600] I say is a confession, an absolute confession. I say it was perfectly fair comment in view of the evidence that has been presented to this jury.

MR. BOUSE: At this point the jury—

THE COURT: I'm denying your motion, Mr. Bouse.

MR. BOUSE: At this point I don't think the jury would ask for the transcripts because they have now got a characterization of them as a confession.

THE COURT: All right, I will deny your motion.

MR. BOUSE: I respectfully except.

* * * *

[2605] THE COURT: All right, bring the jury in. Now, what do you want to say?

MR. BOUSE: I'm saying in light of your Honor's denying my motion for the withdrawal of a juror based upon the inflammatory remarks of the district attorney—

THE COURT: Well, I'm concerned with it. There is no question I'm concerned with it. And, I'll tell you very frankly, Mr. Doolittle, I'm quite upset after a month's trial, after your statement I'm quite upset about it.

MR. DOOLITTLE: Your Honor, I'm making my statement as a lawyer.

THE COURT: You are putting it on the record.

MR. DOOLITTLE: Absolutely. I'm making it in good faith to this Court. I certainly don't attempt to get a mistrial after a four weeks' trial, and I don't know of [2606] [2607] any situation where I have been accused of making an inflammatory remark.

THE COURT: I'm upset because I know that you know what an expressed acknowledgement of guilt is and equate what an expressed acknowledgement of guilt is, because you and I know that an admission taken into consideration with all of the other evidence—

MR. DOOLITTLE: Well, your Honor, very frankly that is not—I say that this thing may be taken as a confession and they may consider it as such.

THE COURT: What do you want?

MR. BOUSE: I would ask your Honor to reconsider the motion.

THE COURT: No, I'm not reconsidering it, but I'm not going to compound it. You didn't take objection.

MR. BOUSE: I couldn't.

THE COURT: And the reason I didn't say anything is because I would just highlight—

MR. BOUSE: And that's precisely one of the reasons I didn't, and I didn't certainly want to move for the withdrawal of a juror in front of the jury and I couldn't ask [2608]-[2609] for a recess in the middle if his summation. There was nothing I could do but sit there and swallow it until the jury was gone. This is as timely as I could

under the circumstances make my objection and my motion. I can't foresee what your Honor's ruling would have been. Had I been certain that your Honor would have ruled in my favor of the motion, certainly I would have made it then. But, the disastrous effect of making the motion and have your Honor deny it—

THE COURT: Well, you could have made an objection without going as far as asking for the withdrawal of a juror. The record didn't even reflect your objection.

MR. BOUSE: I couldn't do it for this reason—

THE COURT: Well, we are all cognizant of the fact that New York State doesn't make too big a distinction between the statute and the confession.

MR. BOUSE: Judge, if I made an objection at that point I would have waived my position on the motion because I would have been heard on that particular thing, and if I only care to make an objection—

THE COURT: No, I don't believe that at all. I'm not [2610] saying I don't believe it in the sense I don't believe it. You didn't object and the Court didn't want to inject itself to enlarge and to dramatize that.

MR. BOUSE: I still submit, your Honor, that this is as timely a time as I could without the presence of the jury make this particular motion on that particular statement. A confession is all we needed in this case and now we have one.

THE COURT: No, I have denied your motion.

MR. BOUSE: Well, then I would ask in—not in the alternative but based upon your denial I would ask that your Honor in some manner cover the situation in the charge.

THE COURT: You are asking me now to charge this jury?

MR. BOUSE: No, no, I'm asking you—

THE COURT: As to the distinction between confession and an admission?

MR. BOUSE: No, I'm asking you not to admonish with regard to Mr. Doolittle's remarks regarding confession yesterday—that would highlight it. But, somewhere in the charge if you can seek to undo what had been [2611] done yesterday.

THE COURT: Both counsel come up.

(There was a conference at the bench not within the hearing of the reporter.)

THE COURT: All right, bring the jury in.

(The jury entered the courtroom.)

(Roll call of jurors; all present.)

* * * *

[2612]

THE COURT'S CHARGE

THE COURT: Mr. Foreman, madam and gentlemen of the jury: It now becomes my duty to charge you as to the law applicable in this case. Before doing so I would like to commend the attorneys for the very able manner in which each of them has carried out his function as an advocate. And, of course, to you, members of the jury, for your devotion to duty as citizens of the community.

This trial has been exacting in so far as the requirements of your attention are concerned because of the tremendous heat, because of some excitement and other things that have transpired during the trial, and therefore it becomes of utmost importance that the final words in this case are given to you in a calm, quiet atmosphere.

* * * *

[2669] The witness then testified that he listened to People's Exhibit 9 for Identification and that he identified the voices as Dino Conte and Thomas Kaiser. He identified People's Exhibit 9-a for Identification as an accurate transcription of the conversation that he heard on People's Exhibit 9 for Identification. He identified voice No. 1 as that of Thomas Kaiser and Voice No. 2 as that of Dino Conte. Copies of People's Exhibits 9-a for Identification were then distributed to the jury and People's Exhibit 9 in evidence was then played to the jury.

The witness then identified People's Exhibit 9-b for Identification as an exact transcript of another telephone [2670] conversation which was recorded on People's Exhibit 9 in evidence. He identified voice No. 1 as that

of Thomas Kaiser and voice No. 2 as that of Dino Conte. Copies of People's Exhibit 9-b were then distributed to the jury and the recording of the telephone conversation, People's Exhibit 9, was played to the jury.

You will note here, madam and gentlemen of the jury, that I have not attempted to marshal or summarize the tape recordings for you. All of the tape recordings which were played for you are in evidence and, again, if at any time you have any questions concerning these exhibits marked in evidence you may request that they be played to you again.

* * * *

[2697] Now, there was mentioned here by both counsel about direct and circumstantial evidence so I am charging you on that.

Now, members of the jury, there are two types of evidence: direct and circumstantial. In order that you may properly consider the evidence I will define both [2698] direct and circumstantial evidence to you and explain to you what the law provides with respect thereto.

Now, direct evidence consists of the testimony of witnesses who have told what they saw and heard in relation to the crimes charged—that is, they testified they saw or heard things said or done by the defendant which if taken together and believed might comprise the elements necessary to find the defendant guilty of the crime charged.

Now, circumstantial evidence is evidence given to you by way of exhibits or testimony of witnesses concerning facts and circumstances not directly showing the commission of the crime charged but from which it is contended that the commission of such crime by the defendant is necessarily to be inferred.

Now, you heard counsel give you the milkman example so I will stay with that. Assume you go to bed at night and you wake up in the morning and there is snow on the ground. You see footsteps from the curb to the door. You look next door and you can infer from the footprints that your neighbor has an early morning visitor, and if you see a milk truck at the curb you can infer from that

[2699] that it is the milkman. And, if you don't see any steps coming back out you can infer that he is still there. But, if you didn't have the milk truck you couldn't infer that it was the milkman because it could be anybody else. Do you understand that?

Now, there are certain rules which control the jury's consideration of circumstantial evidence. When you are considering the circumstantial evidence the circumstances themselves must be proven by direct evidence and must not be left to rest upon conjecture, suggestion, speculation or other inferences. The conclusion sought must flow naturally from the proven facts and must be consistent with them all. The proven facts must exclude to a moral certainty and not alone must all of the proven facts be consistent with and point to guilt but they must be inconsistent with innocence.

In other words, it is of no value if the circumstances and the facts proven from which inferences are to be drawn are consistent both with the defendant's innocence or the defendant's guilt. To be of value circumstantial [2700] evidence must be such that all of the facts and circumstances proven are consistent with and point irresistibly to the defendant's guilt and at the same time are inconsistent with his innocence.

Evidence, therefore, is not to be disregarded or disbelieved merely because it is circumstantial. Where the facts or circumstances are proven by direct testimony to your satisfaction and inferences resulting from those facts and circumstances point irresistibly to a defendant's guilt, a verdict of guilty may rest upon a surer basis than when based upon the testimony of eye witnesses whose memories may fail and whose passions or prejudices may color or influence their testimony.

Now, bear in mind, in this case, however, that the People do not rely in asking a verdict of guilty upon circumstantial evidence alone. They have adduced both kinds of evidence, namely, direct evidence by the testimony of witnesses concerning things they saw and heard directly involving the defendant and some of the other named defendants in the indictment in the commission of the crime charged and the facts and circumstances

[2701] from which they claim the inference of the defendant's guilt irresistibly flows. You are, therefore, to consider both sorts of evidence, and remember that the rules which I have given you concerning circumstantial evidence do not apply to direct evidence and that you are not called upon to rest your verdict entirely upon the evidence which is circumstantial but rather upon the direct evidence and the circumstantial evidence in this case.

* * * *

[2703] Now, you will note that as I get into the specific charges later on that I talk about intent especially when I talk about the assault count, the assault on Ruth Holzman where a specific intent is required. There are species of crimes an essential ingredient of which is a specific intent as distinguished from crimes which only require a general intent. This means that the People must prove more than the mere commission of the acts; they must prove beyond a reasonable doubt that in committing these acts the defendant was actuated by the criminal intent to do the very things condemned by law. Intent is a mental process or state of mind. You cannot see it, you cannot hear it nor can you physically feel it. Therefore, the [2704] existence or absence of specific criminal intent must be inferred from a diversity of circumstances such as presence or absence of motive, admissions made, if any, and having some relation to intent, and presence or absence of mistake, and the defendant's then state of mind as manifested by conduct and all of the other facts and circumstances attending the alleged commission of said crimes.

Intent is a secret and silent operation of the mind and its only physical manifestation is the accomplishment or the intended accomplishment of the thing decided upon. Since it is, as pointed out, a mental operation it is not always easy to establish. It depends upon the particular circumstances of the case, upon the man's spoken word, his actions, or upon a combination of both.

Upon the question of intent you may infer that a person intends that which is the natural and necessary and probable consequence of the act done by him, and unless the

act was done under circumstances to preclude the existence of such intent you have a right to find from the [2705] results produced an intention to effect it.

Now, there was some mention here in summation about confession and admissions. Now, a confession is a direct acknowledgement of guilt made by the defendant. An admission is an act or declaration by the defendant from which either alone or with other evidence his guilt may be inferred. The distinction lies in the fact that a confession is an expressed acknowledgement of guilt whereas an admission is circumstantial evidence of guilt, and that was referred to with reference to the tapes.

So you see in this case you will recall that the conversations that are alleged to have been made by the defendant and his alleged co-conspirators were received in evidence. You must first decide whether the defendant and his alleged co-conspirators made these statements or admissions attributed to them—and I repeat again an admission is a statement by the defendant as to one or more material facts which may be considered by you along with the other evidence in the case on the issue of [2706] his guilt or innocence.

If you find that the statements or admissions were made by the defendant or by his alleged co-conspirators and you find that they were made either in furtherance of a conspiracy or after the conspiracy has been proven, they are binding upon this defendant. But, if you find that they were not made by the defendant or by his alleged co-conspirators they are not binding upon this defendant and you must disregard them.

However, if you find that they were made by the defendant or his alleged co-conspirators, then determine whether they are true in whole or in part and give them such weight as you believe they deserve. You, the jury, shall determine whether or not they were made, and if made the conditions and circumstances under which they were made and the effect thereof and the probative weight and value which may range from the lowest or none at all to conclusiveness.

Under our law, again, a person may not be convicted of a crime upon his own statement or admission standing

[2707] alone. Even if you should find that the defendant admitted the crime in his statement or admission, there nevertheless must be additional proof or other evidence that the crime charged has been committed. I leave it to you, of course, to say in this case whether there is other evidence in addition to the defendant's statement that a crime has been committed.

Now, there has been some mention in this trial—and frankly in the summation—about motive and as a result I have to give you what the law is on that; what importance are you to attach to evidence of motive—that is what it comes down to.

Motive is a causal reason that moves the will and induces one to action. It often plays a part in criminal cases because it frequently points to the reason for doing a particular act. For this the presence of absence of motive becomes important particularly in determining intention or lack of intention on the part of a defendant. Motive is not an element of the crime charged and proof [2708] of motive it is not necessary to establish the defendant's guilt, but such evidence is always admissible and should be considered by you.

Motive is important where the proof is circumstantial in its nature as some of the proof in this case has been because motice can aid the jury in evaluating the weight to be given to circumstantial evidence. So you may determine whether the defendant had a motive, what the motive was, and gave it such effect as you think it is entitled to within the scope of this charge.

* * * *

[2722] Now, you will recall that on many occasions throughout this trial the Court admonished you to the effect that the acts and admissions of the defendant being tried, this defendant, and the acts of any defendants named in the indictment is to be considered only in the event the jury had determined beyond a reasonable doubt that a conspiracy existed between the defendants named in the indictment and this defendant. Once you have determined that a conspiracy existed between the defendants and this defendant, only then may you consider the [2723] acts and admissions of each of the co-conspirators

as relates to the furtherance of the common design planned by them. Such acts and admissions are then admissible against the defendant Thomas R. Kaiser as a co-conspirator. Of course, any acts or admissions committed by the defendant Thomas R. Kaiser are to be considered in the same context in determining whether a conspiracy existed and he was a co-conspirator with the other defendants named in the indictment.

In considering this rule of law you should also bear in mind that the acts or admissions of others other than the defendant named in the indictment made after the common design is accomplished or abandoned are inadmissible as against this defendant Thomas R. Kaiser; that the declarations of a co-conspirator cannot be considered for the purpose of proving or establishing a conspiracy itself.

However, the existence of the conspiracy may be proved by circumstantial as well as direct evidence.

If, after a careful review of the evidence, you find that the accused on trial, Thomas R. Kaiser, conspired to-
[2724] gether with the others named in the indictment to commit the crimes charged, then each of the conspirators is criminally responsible for the acts and declarations of his co-conspirators done to effect the common object of the conspriacy and any of the acts done by one in perseverance of the originally concerted plan are in contemplation of the law considered the acts of all.

Once again I instruct you that only when a person is a part of the conspiracy is he bound by the acts of others done to effect their common, unlawful purpose. The defendant Thomas R. Kaiser in order to find him guilty beyond a reasonable doubt of the first count of this indictment must be found by you to be a party to the conspriacy.

* * * *

[2749] THE CLERK: The two alternate jurors will please retire separate and apart from the main jury body in the charge of a sworn officer.

The regular jury will now retire separate and apart from the alternates in the charge of a sworn officer.

(The jury and the alternates, separate and apart, retire for a luncheon recess at 1:10 p.m.)

[2750] (The following occurred in the absence of the jury)

THE COURT: Now, gentlemen, on the record, I am going under the section of the Code of Criminal Procedure and I will exercise my discretion and give these jurors the exhibits when and if they call for them.

However, I will not give the transcripts; I will let them listen to the recordings if they request it.

MR. BOUSE: And not the photographs?

THE COURT: No, I will keep them out.

MR. DOOLITTLE: You know, you have a problem, Judge, because they are in evidence and if they ask to see them—.

THE COURT: I can exercise my discretion under the code.

MR. DOOLITTLE: If they request to hear the tapes they will be allowed to see the transcripts?

THE COURT: Oh, yes, just as an aid. I don't want them to take the transcripts. I want them to hear the actual recording.

* * * *

[2751] (The jury and the alternates returned to the courtroom at 4:40 and the following occurred:)

THE CLERK: May the record indicate that the two alternate jurors are in the courtroom separate and apart from the regular jury.

THE COURT: Let the record so reflect.

Now, Mr. Foreman, I have your four notes. Before I have them marked as a court exhibit, the first question—and I will take them in this order—No. 1, you request: "Does each party involved in an alleged conspiracy have to have a criminal intent?"

Now the second question: "If you have knowledge of a conspiracy and don't report it are you part of the conspiracy?"

Now, the other two notes I will hold. Will the stenographer please read to them—and you listen very care-

fully to my charge on conspiracy. Start with where I said "Members of the jury . ."

[2752] (That portion of the Court's charge as requested was thereupon read by the reporter.)

THE COURT: Now, that should answer your first question: doing some overt act.

Now, does that answer your questions on the first two, Mr. Foreman?

THE FOREMAN: Yes, sir.

THE COURT: Now you have another request, number three: "At what point does an adviser or informer become a conspirator?"

Now, this is a question of fact for you to determine. I cannot give you the answer to that. On the elements of the conspiracy, that is a question of fact for you to decide. Now, if you want me to recharge the whole count of conspiracy, I will do it.

Do you think, Mr. Foreman, you want that?

MR. FOREMAN: No.

THE COURT: Now the fourth one: "Transcripts 9-a and 9-b." You request them. You cannot have them but you can listen to the recordings. Would you like to listen to the recordings of 9-a and 9-b? We will play them [2753] for you right now. Do you want to listen to it?

THE FOREMAN: Yes.

THE COURT: Mark these notes as court exhibits, and would you put on the record that I have in my own handwriting put on Question No. 1 "each party to a conspiracy must be actuated by a criminal intent," and on note No. 4 I put down "can hear recording only," that these were my own notes that I put on the notes themselves.

Mark them as court exhibits.

(Four notes referred to received and marked Court Exhibits 2, 3, 4 and 5.)

THE COURT: I will allow you to look at the transcripts. They will be distributed to the jury as the recording is played.

Now, do you want to write another note there?

THE FOREMAN: Yes.

THE COURT: Write it out and we will give you a slip of paper. While we are playing this recording I will get the sections of the charge that you request in this last note.

[2754] (People's Exhibit 9 in evidence as evidenced by People's Exhibit 9-a, the transcript, was thereupon played.)

THE COURT: Now, before we have the next recording, Mr. Foreman, I have another note from you. The note says "We would like more information about guilty knowledge."

Now I will call your attention to the portions of the charge that is going to be read and just devote your attention to the phraseology.

(That portion of the Court's charge that was requested by the jury was thereupon read by the reporter.)

THE COURT: Now read what I said about intent.

(That portion of the charge as requested was thereupon read by the reporter.)

THE COURT: Now, is there any question in anybody's mind?

(No response)

Now do you wish to have 9-b of the recording and the tape?

THE FOREMAN: Yes.

THE COURT: All right. Play 9-b. Mark this last [2755] note as a court exhibit.

(Note referred to received and marked Court's Exhibit 6.)

THE COURT: Just let me add this: Like intent, the presence or absence of knowledge can only be inferred from collateral facts. You understand? All right.

Now play 9-b. They all have the transcripts.

(People's Exhibit 9 in evidence was thereupon played, that portion with respect to People's Exhibit 9-b in evidence.)

THE COURT: All right, they may retire.
THE CLERK: The two alternates will retire separate and apart in the charge of a sworn officer and the regular jury will now retire separate and apart in the charge of a sworn officer.

(The jury thereupon retired to their further deliberations at 5:40 p.m.)

(At 5:50 p.m. they went to supper and returned at 7:50 p.m. to their deliberations.)

(The jury returns to the courtroom at 10:05 p.m. and the following occurred:)

[2756] THE CLERK: Your Honor, the two alternate jurors have returned to the court separate and apart from the regular jury, and the regular jury is now entering the courtroom separate and apart from the alternates.
THE COURT: All right. Mr. Foreman, I have received your note. You wish to have reread the fourth, fifth and sixth counts of the indictment.
Mr. McGrath, will you read it, please.

(That portion of the charge requested to be read was thereupon read by the reporter.)

THE COURT: All right, Mr. Foreman?
THE FOREMAN: Yes, thank you.
THE COURT: All right, you may retire.
THE CLERK: The alternate jurors will retire separate and apart in the custody of a sworn officer and the reguar jury will now retire.
THE COURT: Please mark this note as an exhibit.

(Note referred to received and marked Court's Exhibit 7.)

(The jury retires for their further deliberations at 10:12 p.m.)

(The jury returns with their verdict at 10:22 p.m.)
[2757] (Roll call of jurors.)

THE CLERK: The jury is all present, your Honor.

THE COURT: I have this note from the jury stating they have their verdict. Will you mark it as an exhibit.

(Note referred to marked as Court's Exhibit 8.)

THE CLERK: The regular jury will rise and the defendant will rise and face the jury.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: Mr. Foreman, what is your verdict?

THE FOREMAN: Guilty on the first count; guilty on the second count; guilty on the third count; not guilty on the fourth, fifth and sixth counts.

THE CLERK: Harken to your verdict as the Court has recorded it: You say you find the defendant Thomas R. Kaiser guilty under the first count—that is guilty of conspiracy in violation of Section 580-a of the Penal Law; guilty under the second count—that is guilty of attempted extortion in violation of Section 850 and 851 of the Penal [2758] Law; guilty under the third count of the indictment—that is guilty of coercion in violation of Section 530 of the Penal Law, and not guilty under the fourth count of the indictment—that is the count of assault in the second degree in violation of Section 242 of the Penal Law; not guilty under the fifth count of the indictment—that is not guilty of assault in the second degree in violation of Section 242 of the Penal Law, and not guilty under the sixth count of the indictment—that is not guilty of burglary in the second degree in violation of Section 403 of the Penal Law. That is your verdict so say you all?

THE JURY: Yes.

* * * *

[S 1*]

MINUTES OF SENTENCE

* * * *

[S 3] MR. BOUSE: That is right. I am making a motion now for arrest of judgment based upon the jurisdiction aspect wherein the Jury acquitted the defendant of the last three counts of the indictment. Now, the last three counts, which your Honor will remember, concerned the burglary and two assaults. They were in Nassau County, allegedly committed in Nassau County, and the defendant was acquitted of that. The three counts upon which the defendant was convicted are the conspiracy, the attempted extortion, and the coercion.

Now, I think your Honor will recall that there was no evidence adduced with regard to those three counts laying the jurisdiction in the County of Nassau. So that it would appear at this time that the Court does not have jurisdiction to sentence this defendant on that conviction. And [4] the defendant will also move to set aside the verdict—

THE COURT: Wait. On that motion there, on the arrest of judgment, on that ground denied.

MR. BOUSE: And the defendant respectfully excepts. And the defendant also moves to set aside the judgment and set aside the verdict that it is against the weight of the credible evidence in that the guilt of the defendant was not proved beyond a reasonable doubt.

THE COURT: All right. Denied.

MR. BOUSE: Respectfully except.

THE COURT: All right. Go ahead. Now, you may proceed, Mr. Clerk.

MR. BOUSE: I think there was one other thing, if your Honor please, for the record—

THE COURT: Wait. Have you completed your preliminary?

THE CLERK: Absolutely, your Honor. The answer is that there is no legal cause.

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* The excerpts of the sentence are placed here in their proper chronological order. In transcribing the sentence minutes, the Court Reporter paginated and bound them separately from the minutes of the trial proceedings. The sentence minutes are here designated by an "S" preceding the original page designation.

THE COURT: All right. Go ahead.

MR. BOUSE: I think in regard to the sentencing it should be noted for the record that two of the other known defendants have pleaded guilty, that one of them was sentenced to eighteen months in the County Jail [5] and the other defendant received a sentence of six months. And I make that notation for the record so that your Honor might be guided accordingly in passing sentence.

THE COURT: All right. I am not guided by that. I don't care what anyone else does in any other case. The only thing before me is this defendant who was tried before me on a certain indictment and the Jury brought back certain convictions. And I am bound by that. Of course what you say will be taken into consideration by myself. But I am bound by what the Jury's verdict was. All right. Anything else you want to tell me?

MR. BOUSE: No, your Honor. The defendant is ready for sentencing.

THE COURT: All right. Now, we have had a complete conference on this. Your lawyer has been with me and I have a complete probation report.

On the first count of which you stand convicted, conspriacy in violation of Section 580-a of the Penal Law of the State of New York, it is ordered and adjudged by this Court that for the crime of conspiracy in violation of Section 580-a of the Penal Law of which you stand convicted that you be imprisoned in Sing Sing [6] Prison at Ossining, New York, at hard labor, under an indeterminate sentence, the maximum of said imprisonment to be seven years and the minimum one and a half years.

Now, on the second count of the indictment of which you stand convicted which is attempted extortion in violation of Section 850 and 851 of the Penal Law of the State of New York, it is ordered and adjudged by this Court that for the crime of attempted extortion in violation of Section 850 and 851 of the Penal Law of the State of New York of which you stand convicted that you be imprisoned in Sing Sing Prison at Ossining, New York, at hard labor, under an indeterminate sentence, the maxi-

mum of such imprisonment to be seven years and the minimum one and a half years. This sentence to run concurrently with the sentence I imposed under the first count.

And on the third count of which you stand convicted of the crime of coercion in violation of Section 530 of the Penal Law of the State of New York of which you stand convicted, I will suspend sentence.

* * * *

Peo. 9a-4

[PEOPLE'S EXHIBIT 9A]

RB 2-27 # 8A DJW RCO-5 R1
7-3-64—7-5-64—1800-1015
approx. 137-306

A Headline Lounge.

1 Dino, please.

A Sure.

2 Hello.

1 Yeh, captain.

2 What's happening?

1 What's the good word?

2 Nothing.

1 Huh?

2 Nothing,—

1 What happened?

2 —nothing.

1 Well, he ranted and raved today.

2 Yeh.

1 He told me—uh, he didn't tell me. He told—uh, Dave come over and, uh, he told us he told the family he was talking to Sally on the phone and he slammed up the phone on him.

2 Sally slammed the phone on him?

1 No, Holzman slammed the phone up on Sally.

2 Yeh.

1 And he threatened Joey.

2 He threatened Joey?

1 Yeh.

2 Naw, he didn't.

1 He said he threatened to do something to hurt Joey on 111th Street, and, uh, Joey's in the hospital now getting, having a hernia operation.

2 Naw, you see, uh, this is what Holzman said; that Bob went in there and that Bob told him that, "I don't want to give Sally Burns fifty per-cent of my route." And there was too much loose talk where it was going back. The whole thing was handled very bad.

1 Yeh, well, I told you that from the beginning, D.

2 Well, we're out of it. I'm, I don't want to discuss it no more. I don't want to have nothing to do with it.

Forget about it, that's all. I don't want to have nothing to do with it. Let them, uh, you know, whatever happens let it happen, 'cause I don't want to have nothing to do with it, 'cause who knows what's going to happen now. So, that's that. See what happens.

1 So he says, uh, now that, uh, you know, why should I get this fucking deal and fucking. "What's with this thing with Sally Burns. Fuck him."

2 Yeh. Well, that don't mean nothing.

1 He had different things about Joey. He says, "I'm going to tell Joey to go to the District Attorney when he comes out because he threatened him," threatened he was going to, going to hurt Joey for some reason. I don't know what the fuck he said that about Joey for.

2 Who?

1 Sally.

2 Sally didn't say that.

1 Yeh. He says, he says he threatened Joey over the phone.

2 No, he didn't. He's full of shit.

1 And he says he slammed up the phone on him.

2 Maybe he did. I don't know. Maybe he did. Maybe Sally did threaten him. I don't know. Who knows.

1 What did Joey do?

2 Huh?

1 What did Joey do?
2 I have no idea. I don't know what, uh, he's going to do. He said forget about it. It's all over, that's all. We took the shot and that's—
1 Yeh.
2 —the end of it, that's all. Forget about it. It's nothing to discuss no more. Took a shot and it didn't work out; that's all. What the hell; going to hurt people for something that didn't work out? Forget about it. That's the whole thing. That's all. Tell Bob to drop it; forget about it. I don't want to have nothing to do with it no more. It's handled bad and that's all. Took the shot and it didn't work, that's all.
1 Yeh.
2 Let him forget about it now.
1 Yeh.
2 That's all. That's the best thing now. Why get in trouble now? After didn't gain nothing out of it, so—
1 Yeh.
2 So let it go now.
1 Yeh, that's the best thing. That's what I told you that night to forget about it.
2 Yeh. Well, now it's all over—
1 'Cause I knew the fucking man was going to do that you know?
2 Yeh, well.
1 Especially being that it started the way it did, you know. It didn't pay.
2 Well, listen that's all.
1 Thank God he didn't go out there, that's all.
2 Yeh, probably.
1 'Cause he would have wound up in jail. What else is doing? How's business?
2 Well, it's all right. Not bad.
1 No problems?
2 No.

1 Yeh. Where's—Oh, uh, there's no question McGloyne's still alive. He's over here with his whole fucking gang of kids.

2 Yeh, huh?

1 Yeh, he's putting them on the fucking rides here. So I got to hide in the office here so he don't fucking capture me.

2 Hm.

1 'Cause if he saw me—And, uh, I got to, I got to keep ducking him, you know, hide so he don't fucking capture me here.

2 Yeh.

1 'Cause I didn't even say nothing to him. I kept walking. I looked at him. He looked at me and I just kept fucking walking, you know. But he's got, he's got a little hat on him. He's got, well, he's got at least four kids with him walking around there like a proud poppa.

2 Yeh. All right, that's all. See what happens. Whatever happens, happens.

1 All right, tiger.

2 Yeh. Tell Bob to drop this now. Now, let's not have, you know, not to keep on talking about it and everything.

1 Oh, no, there's nothing. I, I told him it's all over, forget about it, nothing to do. Shouldn't happen.

2 Well, he didn't fire Bob?

1 No, he didn't hear nothing today. But, uh, he wasn't in the office when, uh, when he came in he wasn't in the office; probably still out at his house.

2 Yeh.

1 So, uh, he didn't see him, you know.

2 Oh, he didn't go in today, Holzman?

1 No, he just stayed in the house.

2 Hum. Well, who knows.

1 So, uh, he didn't see him yet to—so, I don't know, you know, he didn't see him to get the good news or what.

2 Huh?

1 I don't know it's 'cause he didn't go in, you know.
2 Yeh.
1 Maybe he was afraid to go in and, I don't know, give him the good news, but he—I saw him before I came over here.
2 Well, who did he tell he slammed the phone down on Sally?
1 This morning he told, uh, Dave.
2 Uh, huh.
1 He was telling him he's not supposed to phone him like that. I slammed the fucking phone. I don't talk to a fucking animal like that.
2 Yeh, well, it's best to forget about it; that's all. It was handled very badly and that's it, that's all.
1 Yeh.
2 See, actually, you know, nobody should have known about it because there—you know, Sally feels definitely there was some way this guy knew that it was him, you know, handling the whole thing.
1 It was who?
2 That it was Sally, 'cause he told him that he knew, you know, that it was Sally.
1 That he knew it was Sally?
2 Yeh.
1 Well, he'd have to a fucking idiot to really actually not to surmise it.
2 No, he told him that he was told. He says, "I know it's you. I was told. I know where you're getting the information."
1 Well, he was—that I knew all along. I—
2 Well, this is what he told him.
1 I knew the fucking man knew this all along. This I knew right along. I told you that. There's no question about it. He knew I was telling him things that was going on.
2 No, he didn't mean you.

1 Sure he meant me.
2 No, he didn't mean you.

1 Well, who did he mean?
2 No—he—I don't know. He didn't mean you.

1 Huh?
2 He didn't mean you.

1 He didn't mean me that was telling the—
2 No.

1 —information?
2 No.

1 Well, who did he mean?
2 Well, he doesn't, he didn't mean that information there.

1 Huh?
2 He didn't mean that. I don't know who he meant, becau—but I know he didn't mean you.

1 In reference to what?
2 I don't know; something else. Aw, forget about it. The whole thing is done with now.

1 Well, you're not, you're not explaining it to me. Why don't you explain it to me what you're, what you're talking about.
2 No. He seems to have known something that, uh—Aw, it doesn't make any difference.

1 Known what? What could he have known?
2 He knew something. I don't know how he found out, but, uh—

1 First of all, the man would have to be a fucking idiot, don't you understand?
2 Yeh.

1 The man from the beginning kept roaring, "Who put this fucking man oneme? Who is this man to come in here and tell me about Harold Thompson, about this guy, about that guy? Who put this fucking man on me?" This was his ranting and raving from the beginning: "Somebody put this fucking man on me, that he's doing this—"
2 Well—

1 "—hat he's making the move," he's raring and raving. He was, he told Dave, "This fucking man tells me, 'Nobody goes as far as you do in this business unless he's with somebody.' He says, "Can you imagine this fucking bum telling me this to my face? 'Nobody can go as far in this business on your own ingenuity unless you're with somebody." He says, "He comes out and tells me this to," his face.

2 Well—

1 Don't you see the fucking game this guy plays?

2 Well—

1 I told you this from the beginning that it was—I told you what, what should have been fucking done in the beginning. If it would have been handled the way I told you in the fucking beginning, it would have been done and it would have been over with now.

2 Well, it's—for get about it.

1 First he wanted 5,000. Then he wanted, uh, 25,000. Then he wanted twelve-five. He was fucking ranting and raving. He was fucking ranting and raving.

2 Well, what are you going to do. The best thing is to forget about it now. Best thing is to forget about it. That's the whole best thing.

1 But you see you have to see that, uh, the man, that, uh, you know Holzman has to be a fucking complete fucking moron—

2 Yeh.

1 —not, not to surmise what was going on.

2 Well—

1 You know the way this man came out with things. You know he came out with things the wrong way, Dino. I told you that.

2 Well, listen, you can't tell him what to do so—

1 Well, I mean, I told him things and he went over there and he said it word for word practically. He said it word for word. He said it word for word about Joey. He said about that fucking broad in the Copa, instead of bringing in the fucking situa-

tion with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to. And he was, you know, to straighten it out, instead of just walking in there and, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last. You can't make a statement like that.

2 Well—

1 Well, don't—Wouldn't the guy have to be a fucking moron, Dino?

2 I don't know.

1 This is the same as it was with Kinto's troubles, straightening this out, straightening that. You'd have to be a fucking—like these kids on these rides out here not to know that.

2 Yeh, but, see now, it's a, it's a bad situation. Oh, well, forget about it. Look—

1 Of course it's a bad situation now. It's a—

2 Now you got to drop the whole thing.

1 Huh?

2 You got to drop the whole thing. It's the best thing, you know. Tell him to forget about it, that's all. It's all over.

1 Well, what I would do—Of course, the man, you know, uh, can do what he wants. If he feels it's dead, it's dead.

2 Naw, it's a dead issue now.

1 But what I would do is maybe wait a month—

2 Naw, naw, the ber—Don't, don't even want to, uh, he doesn't want to even go through with it; discuss it no more, you know. That's the best thing. Because, uh, it was handled so badly that it's, uh, no good no more. It's, you can't do nothing no more.

1 Yeh. Well, it wasn't handled by me badly, Dino.

2 No. Who's saying that? But, uh, but, uh, you know, he says forget about it. So the best thing is forget about it, huh.

1 The fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly.

2 No.

1 You understand?

2 But he's not talking—

1 I brought, I brought the man over a fucking shot for you and for him, so, I mean, there's nothing to say that, uh, that, uh, what I did was, uh, inaccurate or I did things stupid.

2 No, not you.

1 So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong and, uh—

2 Yeh, he knows that. He realizes that. He realizes it. He knows it. He knows that it's wrong. That's all. So, see what happens. Who is that, uh? Uh, well, whatever happens, happens; that's all. Best thing is to forget about it now, you know. This guy running to Cahn and everything, you know—

1 Yeh.

2 —it's no good, you know.

1 Yeh. Well, I knew all that was going to happen.

2 Yeh. Well, well, let him go to Cahn. Because there's nothing they can do 'cause Sally's forgetting about it.

1 Yeh.

2 He's got nothing to do with it no more; that's all. You know—

1 I—

2 —I thought he would, he would, you know, become ranting and raving and everything, but he's not. He says, "Forget about it. It happened, it happened."

1 Yeh.

2 That's all.

1 The only thing is, uh, tell him, uh, I don't know what transpired with Joey, but whatever the story was the way he sounded that, uh, Sally threatened Joey over

the phone. He threatened to jump him on 111th Street, something about 111th Street uptown; and, uh, I know he's got a joint up there on 111th Street. He's got a box in a joint up there. Now, I don't know what it was about, but, uh, uh, Joey just went into the hospital on, for a hernia operation. He told him that he said, he told Dave that, uh, uh, that he said, you know while Dave was there that he's going to, uh, go see Joey and tell Joey to go to the District Attorney's office; he was threatened by this guy. So I don't know. Maybe he's liable to talk fucking Joey into doing it, but, uh, I don't know what transpired between them.

2 Naw, forget about it. The whole thing is forget about it, you know. Just stay away from the whole thing.

1 I don't know what transpired between him and Sally.

2 I don't know either. Best thing is to forget about it. That's the best thing right now, you know, I mean, 'cause it was, it's all over. He says—no—he went, he went away. He says, "Look, we took a shot and—

1 Yeh.

2 —that was it, you know."

1 Where did he go up to Greenwood Lake?

2 I don't know. I don't know where he went. It's all over with.

1 Well—

2 Forget about it.

1 —as long as he don't think that there was anything, uh, stupid that, uh, was done through us, that's all.

2 Naw, he, he said to forget about it and that's it, you know.

1 That's the only thing. Uh, you know, I don't want him to think that, uh, that, uh, stupid things done through us.

2 Naw.

1 It wasn't. Everything was accurate.

2 Oh, he knows that. That he knows. Uh, it's just that, uh, he handled it bad on his own, that's all. He said

it yesterday. He said, "Look, if I couldn't handle it," he says, uh, "it was my fault," that's all. And, uh, what, whatever—He says, "Whatever's happened, happened, that's all." He says, "Maybe it's for the best. Maybe I would have got in—" He says, "Maybe I would have got in trouble with this guy," you know.

1 Yeh.

2 So, that's it, you know.

1 All right.

2 But, uh, I'll tell you this. I know that, uh, some other people interested in this guy.

1 Yeh.

2 This I'll tell you for sure. So—

1 Well, let him deal with them then.

2 Well, that's what's going to happen.

1 See what they have to say.

2 That's what'll happen. That's, that's the eventual outcome.

1 See if they do it right,—

2 So—

1 —right?

2 Yeh. Maybe they'll be more successful.

1 Maybe they'll be more successful if they make a right move.

2 Yeh, all right. 1—All right, Dino. 2-All right, I'll see you, Tom. 1—Yeh. 2—So long. 1—I'll see you next week probably. I'll come in the city. 2—All right. 1—All right, kid.

[PEOPLE'S EXHIBIT 9B]

Peo 9B-8 Evid

RB 2-27 # 8B DJW (Same as reel 8A)
480-818

A Headliner.

1 Dino, please.

A Dino? Dino.

2 Hello.

1 What's happening, anything?

2 No, no, it's quiet.

1 Yeh.

2 What's doing?

1 Oh, it's jammed over here.

2 Yeh, huh?

1 Oh, what a fucking day. What a day.

2 Well—

1 Been like this since twelve o'clock noon.

2 Yeh, huh?

1 And it, it broke a little bit about seven to eight, you know. I guess they were eating. Now it's fucking jam packed here again.

2 Sure.

1 Sure, today and tomorrow some fucking days.

2 Well, well, that'll be—It's a hell of a thing over there what he's got there.

1 But then at the—but, uh, then, uh, you know, the kids they go, in this area they go to camp, you know they send them to camp and all that shit.

2 Yeh.

1 So, uh, uh, he says, you know, the rest of the summer is basically the, just the weekends you know. But the weekdays aren't too much 'cause a lot of kids—then a lot of the people out this way, you know, Douglastown and, uh, Bayside, they go away for vacations, you know.

2 Yeh.

1 They go to the mountains and all that fucking shit.
2 Yeh.

1 You know, two weeks here, two weeks there. That cuts it down. It's a fantastic fucking weekend here.
2 Sure.

1 But I imagine you, you're going to feel it in the city a lot of people go away.
2 Naw, it's dead; dead last night.

1 Oh, was dead last night?
2 Yeh.

1 Yeh, a lot of them go away. That Fourth of July weekend knock your brains out.
2 Plus that Goldie and the Gingerbreads opened up at the Wagon Wheel there.

1 Oh, did they?
2 Yeh.

1 Yeh. I thought they weren't going to play over there.
2 Well, that's where they are. So, that's, that. Well, see what happens.

1 Yeh. That'll really knock the jock off 'em.
2 Well, sure.

1 Who was that that answered the phone? Murray?
2 Yeh. Uh, no, Bobby Greco.

1 Oh, yeh. How's Murray?
2 He's all right; took off last night.

1 Took off?
2 Yeh.

1 What the fuck is he taking off on Friday?
2 Well, he's the boss now.

1 Oh, he could afford to do that now, huh?
2 Now he could do that. Well, you got to let him be the boss, that's all. That's the only thing.

1 That's all you got to do, "Is this all right, Murray? What do you think of this?" Then you go for the eyeballs, right?
2 Yeh, yeh, that's what you got to do with him.

1 "Is this all right, boss?" All right.
2 Yeh, that's what you got to do with him. That's the only answer.

1 I saw a thing in the paper there about that Sweet Chariot, about the, uh, the people that owned the Sweet Chariot opened up a delicatessen on 49th Street called Mr. Kiska.
2 Yeh.

1 Did you see that?
2 Yeh, that's where the Rialto was.

1 Where that is?
2 Yeh.

1 Oh, yeh?
2 Um, hum.

1 Oh, the Rialto's out altogether now, huh?
2 Yeh, so's Mattie's Towncrest.

1 Oh, the Towncrest is out?
2 Yeh.

1 Yeh?
2 Well, he got a thirty-day injunction.

1 Yeh, I thought I saw that. I passed there last week. I thought I saw it open.
2 It was open but he got a thirty-day injunction.

1 What about the Casino and that?
2 Well, that they didn't get to. Scotti went up to Hofstedder and told him that Matty was a big Mafia man and they went on Scotti's word.

1 Yeh.
2 And they cancelled the license.

1 Yeh, that's what the bitch about that fucking liquor license. No other business in the fucking world could you do that, see.
2 That's right, yeh, just on his say-so.

1 Meat markets and everything couldn't do that, but that fucking liquor license, forget about it.
2 He won, he won. He beat them in everything. He won all the battles, but he lost the war. It's the old story.

1 That's right, that's the case.
2 Well, there was nothing he could do about it. There was no—This guy was out to get him and that was it, out to—
1 They can give you a, they can give you one of a million excuses to cancel a liquor license.
2 Uh.
1 That's all they got to do is want to get on you, that's why I say this fucking business.
2 Uh, that's all he did was go up there and tell them he was a mafia man, no proof, no nothing, and that was it, and he blew the—well, blew the license. So, that's that. That is that. That's what happens to you. Nothing you can do about it.
1 Well, he don't have to worry.
2 Naw.
1 He must have a few dollars, huh?
2 Yeh, plus the, the other joints'll run you know.
1 Yeh, sure, they'll run.
2 He's starting—
1 Maybe he'll let his brother run them and get out of town.
2 No, he's going to, he's going to start buying a few more now and just keep them, you know.
1 Yeh.
2 Till things cool down he says, and then later on, "I'll, I'll won't be on the scene no more, that's all."
1 Yeh.
2 I won't be. It's only me, you know." See, they want, wanted to knock off the Towncrest because that was like a symbol there—
1 Yeh.
2 —Matty's Towncrest. And that's it, that will be it.
1 Geez, you know what's a nice-looking place, that Golden Horn.
2 Yeh.

1 It's a pretty looking place when you pass it. Is he doing any business in there?
2 Well, I don't know.
1 It's pretty to pass. They got it lit up nice, you know.
2 Yeh, yeh.
1 They got, uh, a nice attraction in the window there you know.
2 Yeh. Well, he put belly dancing there now.
1 Oh, he's got the belly dancing there, huh?
2 Yeh, yeh, yeh. Well—
1 Geez, you know, what's funny, I meet so many customers from the, uh, Town and Country Club in here.
2 Oh, yeh?
1 Yeh. Either here or next door at the driving range, you know?
2 Oh, sure.
1 So many fucking people come in, customers, you know, that must live out here, in Great Neck, or Bayside—
2 Yeh.
1 —right around the area here. Yeh, I met so many of them next door today.
2 Listen, find a victim over there, will you?
1 Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place.
2 Well, find one. Jesus, I'm starving over here.
1 Pulling out of this fucking driveway here.
2 Find a victim there.
1 That's for sure.
2 Sure, we got to find a victim. Now, we, we lost Holzman so now we got to find another victim. Find somebody else out there.
1 Well, we'll see what else comes up.
2 Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks.

1 Well, just be careful now, that's all, be fucking careful.

2 Well, see what happens.

1 That's the only thing I want you to do.

2 Well—

1 Don't take no fucking wacko chances here.

2 Aw, there's no chance to take.

1 How's Bobby? Is Bobby still over there?

2 Yeh, but, uh, I'm not, uh, dealing with them no more. I got a new, uh, crew here.

1 Yeh.

2 Yeh. Older, more experienced in the field of operations. See, you got to form a unit just like they have in the, you know, like the special forces in the Army, you know?

That's what you got to do. You got to form a unit you know with—

1 Yeh.

2 —with, uh, with, uh, walkie talkies and everything, the whole thing.

So—I seen that picture, the Asphalt Jungle there with the great jewel robbery there. So maybe we'll come across something like that. But we'll see what happens.

Either we'll make the papers or, or we'll—next episode we'll make the papers all right. We'll make the newsreel. Gabe Pressman will be interviewing everybody in it, like he did in the last time.

1 I had a—I had a thing a guy was talking to me about. Uh, when I come over I'll tell you about it.

2 It's got to be substantial though, you know. Listen, when the guy told me about this thing that time on Park Avenue it didn't make any sense but—

1 You know I had to laugh at myself. I was in the store there, the drug store, I saw a picture of Max Factor. Geez, I wonder if he's got any money.

2 Heh. heh.

1 He's, he's pretty big in that business, too, you know.
2 Yeh.
1 When I come over I'll tell you about it, what this guy told me. The—see what, uh—
2 What's our boy, Irving, doing? Is he, is he—He's not leaving the house, huh?
1 No, he's still in the house.
2 Yeh.
1 He's fucking terrified.
2 He's not coming to New York, huh?
1 No, he won't, he probably won't for a while—
2 Well—
1 —but, uh, that'll wear off. He'll be back in action.
2 Yeh, yeh. Meanwhile, he has to stay cooped up there.
1 Yeh, they're all out there. There's the daughter, son. They're all, uh, living out there.
2 Well, listen, maybe he's better off, you know.
1 He closed the, uh, he closed the New York office down Friday, yesterday—
2 Yeh.
1 Nobody over there, but he—
2 Well, what is he going to do with the Great Neck office?
1 I don't know what he's going to do with it, going to get rid of Nick.
2 And who's Nick?
1 Nick is the guy that, uh, (Indistinguishable) kid is out there, but he really doesn't know, but he's the only one that's been going in. The kid has been going in.
2 Well, maybe, maybe he'll, he'll want to call up anyhow, Holzman. Maybe he'll want to speak to somebody, Irving. So, see what—
1 Well, you never know. He'll be left alone for a while. See what develops with him, right?
2 Yeh. Well, I know what's going to develop so—

1 The man can't, uh, the man can't, uh, stay there forever, right?

2 Yeh. Well, he can never come into New York again though.

1 He's got to come out. He's got to function. He got to make—he's got to keep the, the route functioning. If he don't, if he doesn't he loses the fucking route. If he can't make these tremendous payments on his fucking route, you know, he'll lose the route.

2 He can never walk into New York again, he knows that.

1 Well—

2 The minute Lyn Durant is out. You know he's in, he's in Chicago now.

1 Who, Lyn Durant?

2 Yeh, but somebody, the other fellow's in Chicago, Sally.

1 He went to Chicago?

2 Yeh.

1 Yeh.

2 He left this morning. Now this guy is in for a little activity. He didn't think the—But, please don't say nothing to even Bob no more.

1 No, no.

2 Because Bob said something to this guy and it came back to Sally and—

1 Said what?

2 I don't know. Sally's blowing his fucking top. Started screaming at me and everything. He says—I says, "Look," says, I told him, I says, "Tommy did the best." He says, "Yeh," he says, "but there, there was a leak from one of the other people." Either Dave or somebody must have caught a hint of something. Or Bob, you know. You never can tell.

1 I told you before, Dino, the man would of had to been a fucking moron not to know what was going on, the way it was done. Don't you understand? Now, naturally when, uh, naturally when, uh, when Holzman

mentioned to Bob that, uh, this man wanted to come in as a partner, "in my operations," you understand, he probably told him, "Well, you're not coming, he's not coming in a partner in my business."

2 Well, that's what I told him.

1 You understand? But what could he say? Dino, could he say, "Yeh, Yeh, uh, Irving, I, I think that that's a good thing." Are you kidding me? He would of fucking crucified himself.

2 Yeh.

1 He would have crucified himself, because the fucking man has got his phone tapped. He knows the information's coming from him. He knows it's Sally from the fucking beginning. The man knows it. Don't you understand? He'd have to be fucking crazy. How many weeks ago did I come to you and I told you, Sal, Sal—Irving was telling everybody Sally walked in the office Friday—Monday when that event happened—and then after that he says, "If you would of went with me Friday this would have never happened." I told you that.

2 Yeh.

1 He was telling fucking people even though Sally meant it in a way that if people knew that he was with him it wouldn't have happened.

2 Yeh.

1 But he just as much as told him, "Well, I wouldn't, this wouldn't of happened if you went with me. You would of done as I told you."

He was going around telling fucking people that. I told you that two weeks ago, three weeks ago.

2 Well, I tell you one thing: Sally is determined he don't care if he gets pinched he told me. He says, "What are they going to pinch me for?" He says, "Let them pinch me." He says, "I don't) (Continued next page.) care." He says, "Let him, let him go to the FBI and let him go to—"

1 But you fail to realize this is the situation, Dino. The man's not going to give a fucking inch; not an inch. Now—.

2 Only if he can't function, Tom.

1 Yeh, only. And what are you going to do if he can't function? He loses the route.

2 Well, but this, this is Sally wants. He wanted to ask you that. He says do you feel that if he lost the route that uh, because uh,—He's going all the way. He told me.

1 Well, that's all he's going to do. He's certainly not going to kill the guy, Dino, and uh, if he keeps this guy so terrified that he can't function, that Nick's got to function here, and this guy Red's got to function in New York then—

2 Red does not function. Red's quitting Monday. Red is quitting Monday. Red ain't functioning in New York.

1 He's quitting?

2 Yeh.

1 Yeh? What makes you say that?

2 I'm telling you, he's quitting.

1 Well, that's that's why I say that's the only thing and now this is what's going to happen and, and you, the man will lose the route, you understand, but he's not going—uh, he won't accomplish anything like this. I, uh, to me this is wrong. I would let things go.

2 Well, no, Sally has these, these four notes from Irving for $25,000 a piece that he has here, you know. I mean, they're the one's due the 1st of July, it's past due already.

The other one's due uh, uh, in August, and the other one's due in September, and the other one's due in October. One's past due already. So, uh, see what happens.

1 Four notes on what?

2 I don't know. Personal notes $25,000.

1 Four personal notes totaling $25,000?
2 Totalling $100,000.
1 Well, I don't know, I don't know anything about that.
2 This is how they came up. I don't know.
1 That was that, with that the other business you were talking about? With the, with the Graziano and the, the commercials?
2 No, no they, they did something else. You know, uh, oh, that he's a partner in. Forget about it. Nobody can ever use that.
1 Yeh, well, I don't know anything about that—
2 Yeh,
1 —but uh, this here to me is uh, to me, is going about it the wrong way, Dino.
2 Well, you can't tell him nothing, Tom. You can't even say nothing. He's going—
1 I mean to terrorize this guy is, is wrong because within two, three months if things go wrong that he can't have the operation going right, and now, uh, he'll lose the fucking route.

Then, uh, then he loses the whole route, Dino. that's not only his deal.
2 Well, you can't tell, I'm telling you the guy went to Chicago this morning. I know what he went there for. This man does never go to Chicago no more 'cause the minute he steps in Chicago he, he gets, somebody'll be waiting for him, put him right back on the plane and send him back to New York.
1 Well, I don't know if it's the right thing.
2 Well, look, whether it's the right thing, whether it isn't the right thing, uh—See, I'll tell you what Sally told him over the phone.

He says, "Listen you cocksucker—" After Irving you know said, "Well, no, my partners don't want you," and this and that.

See, he blamed it all on his partners.
1 Yeh.

2 He said, "It's not me. It's my partners. They don't want you." So Sally said, "Listen you cocksucker," he says, "I'm telling you now," he says, "you used my name a lot of times. You told people that I beat you for $2,500 with that Gallo business.
"I did it as a favor" which he did, he straightened it out as a favor.

1 Yeh.

2 —never got no money for it or anything and I didn't want anything." He says, "But you don't think you're going to use me now." So—and then Sally hung up on him.

1 Yeh, he said that he slammed the phone up on him.

2 Yeh, but it was reversed. Sally—

1 Yeh.

2 That's what's terrorizing him. He told him uh, he says, "I'll guarantee you you can't come to New York." And he meant it.

1 Yeh.

2 And this guy knows he meant it.

1 Y[redacted]

2 I'm telling you I know this man like a book. You know I've seen him do things, they've gone wrong with unions and other things and he's he's backed off and said, you know, see because he wanted me to tell you, you know well, I, see he doesn't know that I know you.
See, when you were here last night he was around, the other kid was around and Joey was around when I was talking to you over the phone, see.

1 Uh, uh.

2 So he wanted me to tell you just look, we're laying off, that's it, you know, it's none of our business no more.
We, we took a shot and what not, but I—see, I know what, how he is, you know. I know what he's going to do. That's the only thing, the only thing, you know, I don't want, I don't want to see Bob, you know, anything happen to Bob, you know in this whole business here.

1 No, nothing can happen to Bob, see, nothing can happen to Bob. The only thing that can happen to Bob is that uh, he's go actually he's got fifty percent of his, of Coin-A-Matic route, that uh, the only thing that can happen to Bob is of course he'll try to pressure him more, you know.

2 Well, if he pressures Bob—

1 Because everything that Sally does he's going to blame—If anything happens to Sally, like, say anything happens to Holzman—Now, let's just take a for instance.

Say Holzman went out was hit by a, by a drunken kid tonight, as a hit and run driver, Bob is in, Bob is in Mineola jail tomorrow morning.

B How do I get outside here?

2 Yeh.

1 He's in Mineola jail tomorrow morning. They'll pick him right up and take him out there, 'cause anything that happens to him she's going to blame Bob right away because they're blaming him now.

You don't know what they're doing to this guy. He can't get his, he can't get his machines moved, Dino. It's, it's a fucking pathetic. I feel sorry for him.

2 Yeh.

1 He can't get his fucking machines.

2 Well, maybe we're going to have to go out, uh, maybe, uh, maybe Sally'll have to become his partner, uh, you know, on the surface temporarily.

1 He can't get his fucking machines moved. You know what he's got? He sent some fucking drunk, some guy that used to do work for him before with a station wagon moving machines from bar to bar, you know, switching them in new locations, and that. The fucking National Truck won't touch him. Ronnie was saying, "Fuck him, let him, let his work pile up."

2 Where is this National Truck?

1 They're out here in the, in the back on a lot in back of the Peter Luger's thing.

2 Oh, by Peter Luger's?

1 Yeh.
2 He can't go by Peter Luger's anymore anyhow.
1 They got a—
2 How many trucks do they have?
1 Two.
2 Two.
1 But then he rents. He's he got two on with the thing but then he rents some of them Hertz things. When they, you know, when they're very busy he rents them by the day.
2 Well, we'll see what happens. All right, I, I'll let you know next week, uh, I, I, I'll tell you next week. You'll see some big results.
1 But the uh, the only thing I'd say here is that uh, uh, the man, the man won't, is not going to give an inch, I know now.
2 Yeh.
1 And if it's done wrong now you're not going to do anything but, uh, to, but to tie him up so that he'll lose the fucking—he'll lose everything.
2 So what. Let him lose it. Oh, he's going to know that. He's either going to have to know that he's going to lose it or he's got to pay this money that he owes; that's all.

He owes all this money. I mean the guy took the money and he took it in good faith, and they loaned it to him in good faith, no interest, no nothing.

1 He took a loan. Is that the way it's set up?
2 Yeh.
1 Well—
2 He took this money in, in good faith, as friends and now—
1 You know I got these notes here with, wh—with his signature on it. You want them? The $900 worth of Charlie Brown's notes?
2 Yeh, bring them over, too, bring them over. We'll put, put them all in together here.

1 Yeh, I got them, too.
2 Put them in, too.

1 Well, you see he could turn around and, you know, and say that he had collected the money and was giving it to me and I was giving it to Holzman. He could say, "For your fucking information that money that you were getting, you know, Tommy wasn't collecting it. I collected it and I gave it to Tommy, or Dino collected it and he gave it to Tommy—
2 Yeh.
1 —and he gave to you."
2 Yeh.
1 Now he got over about $450 of that money so far, see. See maybe something like that could give a break, you know, 'cause otherwise I'll tell you he's crucifying fucking Bob.
2 Well, that's what we got to put a stop to.
1 He's crucifying Bob. He's got everybody shunning him. Nick shuns him. The fucking mechanics out there, you know, don't tell him nothing, don't say nothing to him, and he, he's blaming the whole fucking thing.

You see, naturally with me, he accuses me, too, but I got nothing to do with him, you know, but uh, you know Bob's got to fucking live with him. And you know another thing, I had to give Bob $2,500 he tried to lift, he made loans.

See now to show what a cocksucker this gus is him and Bob made loans, uh, him and Bob made loans to juke boxes totalling $3,000. Then Holzman turn around and didn't put the money in the bank.
2 Humm.
1 You understand?
2 Yeh.
1 So—
2 Well, hello, hello. Hello. Yeh, what happened?
1 Yeh, I pressed this incom button—
2 Oh.

1 —and it went off.

1 And he didn't put the money in the bank, see, and he was going to let the notes bounce.

2 Yeh?

1 You understand? And then the both of them were going to go to court, uh, you know, when the things came up, as the you know issuing the checks with no money in the bank, and he was going to take care of his half. This is what the fucking story was. He was going to take his half as a fifty per-cent partner.

2 Well, I'll tell you.

1 So, the kid's taking an awful fucking, uh, beating, an awful beating, but like I don't want to go and, and say to Sally, criticize Sally what he did. You understand?

2 Yeh.

1 But he did do the fucking thing wrong because he said things verbatim to this man that knew they come from Bob, knew it, Dino, believe me. He knew it come right out of his mouth.

2 Well—

1 Now—

2 —maybe we shouldn't have done it that way and—

1 He knew it come right out of his mouth. That's why he's, that's why he's crucifying this fucking kid now. Now it's all he has to do is if he wants to finish this fucking man in Chicago go down to that fucking National City Bank on 43rd Street and get a copy of them fucking—

2 Chase Manhattan.

1 Chase Manhattan and get a copy of the, you know, you get a photostatic statement.

2 He don't even have to do that, Tom, don't you understand?

1 Well, if he shows him that he won't have to go to nobody else because he'll be fucking finished with the —definitely lose his fucking job.

2 Well—

1 All right, listen, I'll talk it over with you when I see you.

2 Yeh, because he's going all the way with this guy and I don't want, I don't want, I hope I'm hoping this guy just tokenly repays some of that money, you know what I mean, because this way there's no, uh, nothing, no violence or anything, 'cause I know that, I know when this guy made up his mind to do something there's no, uh, there's no more stopping him, 'cause uh, I mean, uh, he went out to Chicago bent on doing something.

And, uh, that's what's going to happen. All right. Listen, maybe I'll see you tomorrow or something—

1 Yeh, I'll be in the city Monday or Tuesday.

2 Yeh, bring something over here so I got my uh, special forces here.

1 Yeh, all right. Let me see if anything comes up. If anything comes up sensible though. It's got to be sensible.

2 Look this is why we're in that daring business, the special forces. We wear the green berets. We do anything risky or non-risky. We got insurance policy floaters we take out.

1 Yeh, all right.

2 All right, I'll see you. So long.

1 Right.

COUNTY COURT OF THE COUNTY OF NASSAU
STATE OF NEW YORK

Ind. # 20122

THE PEOPLE OF THE STATE OF NEW YORK

—*against*—

THOMAS ROGER KAISER, DEFENDANT

SIRS:

PLEASE TAKE NOTICE that the defendant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, Second Judicial Department, from a judgment of the County Court, County of Nassau, rendered on the 12th day of August, 1966, and from the sentence imposed upon the defendant on said day, and from each and every part of said judgment and sentence, and from each and every intermediate order therein made.

Dated, the 12th day of August, 1966

Yours, etc.,

F. COURTS BOUSE
Attorney for Defendant-
Appellant
Office & P. O. Address
Woodbury Road
Woodbury, New York

TO: WILLIAM CAHN
District Attorney of Nassau County
COUNTY CLERK OF NASSAU COUNTY

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 15, 1967

HON. GEORGE J. BEDLOCK, *Presiding Justice*

HON. MARCUS G. CHRIST)
HON. SAMUEL RABIN)
HON. JAMES D. HOPKINS) *Associate Justices*
HON. A. DAVID BENJAMIN)
HON. GERALD NOLAN)

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

THOMAS R. KAISER, APPELLANT

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Thomas R. Kaiser, defendant in this action, having appealed to this court from a judgment of the County Court, Nassau County, rendered August 12, 1966; and the said appeal having been argued by Peter L. F. Sabbatino, Esq., of counsel for the appellant, and by Henry P. DeVine, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

HERMANN M. POGUL
Clerk of the Appellate Division

COUNTY CLERK'S OFFICE,)
STATE OF NEW YORK,) ss:
COUNTY OF NASSAU)

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original Order of Appellate Div. Filed in my office May 18, 1967 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. STANLEY H. FULD, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

THOMAS R. KAISER, DEFENDANT-APPELLANT

CERTIFICATE GRANTING LEAVE

BAIL

I, STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to § 520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

I further certify that in my opinion there is reasonable doubt whether the judgment of conviction will stand upon appeal to the Court of Appeals.

Bail as at present provided is fixed pending appeal to the Court of Appeals in the sum of $40,000.00 on condition that the appeal be brought on for argument during the September 1967 Term.

Dated at New York, New York
June 26, 1967.

STANLEY H. FULD
Chief Judge

* * * *

24173

Indictment No. 20122-1964

THE PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFF-RESPONDENT

-against-

THOMAS R. KAISER, DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

PLEASE TAKE NOTICE, that the defendant, above named, hereby appeals to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of the Appellate Division on the 15th day of May, 1967, a certified copy of which was filed in the office of the Clerk of the County Court, Nassau County, which order affirmed the judgment of the Defendant's conviction for the crimes of (a) Conspiracy to commit extortion; (b) Attempted extortion, and (c) Coercion, upon which the Defendant was sentenced to serve a term of one and one-half to seven years, and the Defendant hereby appeals from each and every part of said judgment and order, and from all intermediate rulings and orders.

PLEASE TAKE FURTHER NOTICE, that this appeal is taken pursuant to leave granted by the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals, by a Certificate granting leave, dated June 26, 1962, permitting this appeal to be taken and certifying that questions of law are involved which ought to be reviewed by the Court of Appeals, and that in his opinion there is

reasonable doubt whether the judgment of conviction will stand on appeal to the Court of Appeals.

Dated: New York, N. Y.,

Yours, etc.,

SABBATINO & TODARELLI
Attorneys for Defendant-Appellant
Office and Post Office Address
233 Broadway
New York, N. Y. 10007.

TO:

CLERK OF THE COUNTY COURT
County of Nassau,
Mineola, N. Y.

HON. WILLIAM CAHN
District Attorney of Nassau County
Attorney for Plaintiff-Respondent
Mineola, N. Y.

* * * * *

No. 470

Nassau Index # 24173 19—
Filed, Dec. 19, 1967, Franklin H. Ornstein,
County Clerk, Nassau County

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

REMITTITUR December 7, 1967

2. No. 470. 67.

THE PEOPLE &C., RESPONDENT

vs.

THOMAS R. KAISER, APPELLANT

BE IT REMEMBERED, That on the 9th day of October in the year of our Lord one thousand nine hundred and sixty-seven, Thomas R. Kaiser, the appellant - in this cause, came here unto the Court of Appeals, by Sabbatino & Todarelli, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent - in said cause, afterwards appeared in said Court of Appeals by William Cahn, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Peter L. F. Sabbatino, of counsel for the appellant -, and by Mr. Henry P. De Vine, of counsel for the respondent - , and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,)
Albany, December 7, 1967.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk.

[SEAL]

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

THOMAS R. KAISER, APPELLANT

Decided December 7, 1967.

* * * *

KEATING, J. Irving Holzman was an executive of several corporations engaged in the distribution and operation of coin-operated equipment whose enterprises reached into four of the five boroughs of New York City as well as Nassau and Suffolk Counties. In recent years Mr. Holzman's business ventures grew and prospered to such an extent that the self-appointed "family" of sharers in the prosperity of honest businessmen determined that the time had come for Mr. Holzman to share his wealth—"to give up a piece" of his business.

Sometime during the early part of June, 1964, a concerted effort was commenced to extort $25,000 from Mr. Holzman as well as a 25% share of his business interests. As the arrangement was explained to Mr. Holzman, "If at the end of (a) week you have $1 left, [we] take 25 cents and you keep 75 cents."

Mr. Holzman, unmoved by the "family's" generosity and shaken by an assault on his wife by certain members of the "family", described to him as "animals", contacted the Nassau County police.

During the month of June the police, with the consent of Mr. Holzman, through the use of wiretaps and bugs, recorded numerous conversations of Mr. Holzman and one Salvator Granello, known to his "family" and "animals" as Sally Burns. These recordings clearly established the existence of an extortion conspiracy on the part of Granello, Dino Conte and others.

As Mr. Holzman's adamance persisted through June, the "family" apparently became more anxious. On the morning of June 30, 1964 Mr. Holzman's daughter, Mrs. Ronald Billings, then pregnant and residing in Plainview, received a call which, from its contents, could only have been made by one of the "animals." Mrs. Billings was advised that "if your father doesn't cooperate we'll come to

Sylvia Lane [Plainview] and kick your * * * pregnant belly in."

With this threat to the family of Mr. Holzman, the District Attorney's office determined that it could best protect Mr. Holzman and his family and determine precisely who was responsible for the threats by recording the telephonic communications made by Salvatore Granello and Dino Conte from several bars which they frequented and from which they had previously communicated with Mr. Holzman.

In a petition and affidavit filed pursuant to section 813-a of the Code of Criminal Procedure, an assistant district attorney of Nassau County asked for a court order to make the necessary wiretaps.

In testimony made under oath the assistant district attorney related, with particularity and detail, the events which had transpired up to that point and which have been briefly narrated above.

At the close of this testimony the following colloquy took place:

"The Court: At the present time have you been able to get any clue which would lead you definitely to the caller [who threatened Mrs. Billings]?

Mr. Levy: We have not, your Honor.

The Court: You feel as though this tap will assist you in that quest?

Mr. Levy: Yes, your Honor.

The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holzman, in regard to the demand for $25,000 and 25 per-cent of his business.

The Court: So that in addition to the alleged extortion you feel faced here with the threats of violence and physical harm to innocent people?

Mr. Levy: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holzman at her home in

Nassau County as well as the threatening telephone call to Mrs. Billing[s].

The Court: I am satisfied that there is reasonable ground for granting your application."

The order issued by Justice SPITZER in compliance with the provisions of section 813-a recited the particular telephone numbers involved as well as their locations and went on to order "that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over the telephone located at *255 West 43rd Street, New York County, New York*, now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated".

The order was to be effective from July 1, 1964 until August 29, 1964.

On the evening of July 3 and morning of July 5, during the course of the tap made on the telephone located at the Headline Bar, there were recorded conversations between Dino Conte and the defendant-appellant in this action, Thomas Kaiser. The conversations clearly and beyond any reasonable doubt implicated the defendant as a co-conspirator who had supplied Granello with detailed information regarding the operation of Mr. Holzman's business enterprises. In addition both conversations involved discussions of what should be done in light of Mr. Holzman's intransigence. The defendant to his credit appears to have been against terrorizing him.

On July 15, 1964 Granello, Conte and Kaiser were arrested, and on July 16, 1964 Kaiser was arraigned on an

indictment charging him with coercion, attempted extortion, conspiracy to commit extortion, assault second degree and burglary second degree. The defendant was convicted, after a trial by jury, of all but the latter two crimes. At the trial and over the objection of defense counsel the transcripts of wiretap recordings made on July 3 and 5 were admitted into evidence.

Alleging, among other things, that the admission of this evidence was reversible error, the defendant appealed to the Appellate Division (Second Department). The court unanimously affirmed his conviction. The defendant appeals to this court by permission of the Chief Judge.

The defendant argues on this appeal that the Supreme Court in *Berger* v. *New York* (388 U. S. 41 [1967]) struck down as unconstitutional on its face the very statute which authorized the wiretap order and therefore the evidence seized pursuant to that order was erroneously admitted. The defendant urges, in addition, that all wiretap evidence should be held to be inadmissible because the seizure and divulgence of the evidence constitutes a violation of section 605 of the Federal Communications Act.

In *Berger* v. *New York* (*supra*), a case which involved the admissibility of evidence obtained by the use of a bugging device, the Supreme Court struck down section 813-a of the Code of Criminal Procedure. The statute read as follows: "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhea[r]d or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the jus-

tice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The Supreme Court, after examining the statute, concluded that it was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments" (388 U. S. *supra*, p. 44). Specifically the court found the statute "defective on its face" for several reasons: "Eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described. The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is, thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded * * *.' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized.

As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. Moreover, the statute permits, and there were authorized here, extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest.' Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures" (388 U. S. *supra*, pp. 58-60).

Whatever the effect of the decision on bugging cases and future bugging orders in this State, it should be noted that nowhere in the opinion in *Berger* does the court hold that wiretapping comes within the purview of the Fourth Amendment. While we shall accept for the present the

appellant's assertion that *Berger* brought wiretapping within the purview of the Fourth Amendment and while we hold that the conditions set forth in *Berger* should, as a matter of policy, apply to future wiretapping orders issued under the statute, we believe that a reversal of the appellant's conviction is neither mandated by *Berger* nor by the prophylactic purpose of the exclusionary rule to which wiretap evidence obtained in violation of the Fourth Amendment is now subject.

At the time the wiretap order in the case at bar was issued, there were no Federal consttiutional restraints on the securing of wiretap evidence. The Supreme Court had steadfastly adhered to its decision in *Olmstead* v. *United States* (277 U. S. 438) that wiretapping, accomplished without a trespass into a person's home or other premises, does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Indeed, to this day *Olmstead* has not been squarely repudiated by the Supreme Court.

The Constitution and the laws of this State, however, place severe restrictions on the right of public officials to obtain evidence by wiretapping. In 1938 the people of this State ratified setcion 12 of article I of the State Constitution. That amendment provides: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

Section 813-a of the Code of Criminal Procedure quoted earlier and section 738 of the former Penal Law supplemented the provisions of the Constitution and extended them to all eavesdropping evidence obtained by "instrument" without the consent of one of the parties to the conversation.

In *People* v. *McCall* (17 N Y 2d 152) we held that the expressions "oath or affirmation" and "reasonable grounds to believe" contained in the statute "could have no other

meaning" than to require the same factual basis to be shown for the issuance of the eavesdropping order "as in the case of search warrants" (17 N Y 2d 159). And relying upon cases in which we held affidavits to be insufficient in ordinary search warrant cases, we held that the wiretap evidence should have been excluded.

Subsequently in *People* v. *McDonnell* (18 N Y 2d 509) we applied the same constitutional standards governing ordinary searches in holding that a defendant—not a party to conversation over a telephone maintained for his benefit—had standing to challenge the factual basis upon which the wiretap order was issued. And in *Matter of Sarisohn* (21 N Y 2d 36, decided herewith) we again strictly adhere to the standards set down in cases involving ordinary searches and seizures.

It is thus "clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' * * * [was] made a precondition of lawful electronic surveillance" (*Lopez* v. *United States*, 373 U. S. 427, 464 [dissenting opn. of BRENNAN, J.]) and that no wiretap or bugging order could issue except upon an adequate factual showing, i.e., probable cause to believe that a crime had been committed and that the conversations particularized in the order would be seized.

With this requirement as with all the requirements of the statute the order in question complied. The most cursory examination of the testimony of the assistant district attorney made under oath before the Judge who issued the warrant clearly indicates that there was probable cause to believe that a crime was being committed and that the conversations regarding threats to Mr. Holzman and his family would be obtained.[1]

It is true that the order did not adequately specify the precise conversations which were sought—although the testimony of the assistant district attorney under oath, which becomes part of the order, did (Code Crim. Pro. § 813-a); that the order was not sufficiently limited in

[1] The conversations which were seized related in part to what was going to be done by the conspirators in light of Mr. Holzman's refusal to capitulate to the lawless and disgraceful conduct of the defendant and his co-conspirators.

time—although there is no evidence that the execution of the order exceeded a reasonable period and the actual conversations seized came within a limited period of three days; that no exigent circumstances were alleged for dispensing with the notice requirement—although, under Supreme Court decisions defining "exigent circumstances", those circumstances were present here (*Ker* v. *California*, 374 U. S. 23, 37-40); and that there was no return on the warrant—although we presume, since the defendant did not argue otherwise, that a return was made.[2]

The reason for these defects is obvious—there has been no previous decision outlining the necessity for those requirements which *Berger* found to be mandatory. Under these circumstances, a reversal of the conviction would not be warranted either under the decisions of this court or the Supreme Court (*People* v. *McQueen*, 18 N Y 2d 337; *People* v. *DeRenzzio*, 19 N Y 2 d 45; *People* v. *Rensing*, 20 N Y 2d 936; *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293).

In *Stovall* v. *Denno* (388 U. S. 297) the Supreme Court set out the governing considerations in determining whether a fundamental change in constitutional interpretation should be applied retroactively: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of crimi-

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[2] The authorization for the wiretaps included not only the conversations of Salvatore Granello and Dino Conte and those with whom they communicated but all those who communicated over the telephone located at the Headline Bar. Such authorization was necessary for the purpose of immunizing the police from prosecution for violating section 738 of the former Penal Law, since the very device which the police were apparently required to employ would pick up all conversations on the telephone in question. It is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial supervision and subject to the severest constitutional restraints.

nal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'"

The standards outlined in *Stovall* are identical to the standards we have adopted in recent cases. In *People* v. *McQueen* (*supra*) we considered the effect that a retroactive application of the standards outlined in *Miranda* v. *Arizona* (384 U. S. 436) would have on the administration of justice in our courts as well as the fact that the evidence which would be excluded under the *Miranda* rulings in no way affected the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U. S. 618, 639). In so doing we overruled explicitly the rationale of our decision in *People* v. *Loria* (10 N Y 2d 368), which had given retroactive effect on the exclusionary rule enunciated in *Mapp* v. *Ohio* (367 U. S. 643) as to those cases still on direct appeal. The basis of the ruling was the existence of a so-called "general rule" which required that this court apply the law as it exists at the time of our decision. A careful examination of the cases cited in *Loria* reveal that there was no such general rule and that the same considerations we adopt here, in fact, governed all those cases in which retroactive effect had been given.[3] (See *Knapp* v. *Fasbender*, 1 N Y 2d 212; *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419; see also, *Robinson* v. *Robin Dry Dock & Repair Co.*, 238 N. Y. 271; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475; *Harris* v. *Jex*, 55 N. Y. 421.)

Applying these standards in the case at bar, we are led to the conclusion that the *Berger* decision should be given only prospective effect. The purpose of the exclusionary rule, to which *Berger* made eavesdropping evidence subject, is deterrence of future police conduct. Applying

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[3] In *People* v. *Friola* (11 N Y 2d 157) the court limited the effect of *People* v. *Loria* (*supra*) and held that *Mapp* v. *Ohio* (*supra*) would be applied retroactively only to those cases on direct appeal in which an objection had been taken to the admission of the allegedly illegally seized evidence. This decision, as the dissenting Judges noted, amounted to a rejection of the rationale of the so-called general rule (11 N Y 2d, *supra*, p. 161).

Berger retroactively will not, therefore, undo the violation of the defendant's rights which may have already taken place. The admission of the wiretap evidence has no effect on the "integrity of the fact-finding process" (*Linkletter* v. *Walker, supra*). Indeed, the probative value of the evidence is beyond question. In addition, thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan*, 11 N Y 2d 350, cert. den. 371 U. S. 877; *People* v. *Pugach*, 16 N Y 2d 504, app. dsmd. 383 U. S. 575; *People* v. *Cohen*, 18 N Y 2d 650, cert. den. 385 U. S. 976, rehearing den. 385 U. S. 1032). Moreover, even under prior law no eavesdropping order could be sustained without " the procedure of antecedent justification before a magistrate", which is central to the Fourth Amendment. Under these circumstances we hold that *Berger* should be held applicable only to those cases in which the orders were issued or the eavesdropping took place after the date of that decision.

The argument is advanced, however, that, since the statute was struck down as unconstitutional on its face, an order issued pursuant to it cannot be upheld. This argument is similar to that which has been rejected in all the recent decisions on retroactivity. The argument is that, if we hold that particular police conduct is now violative of an individual's constitutional rights, how can we say that the same conduct in the past did not likewise offend against his rights? Similarly if the offensive police conduct was authorized by a statute which is now found to be unconstitutional, how can we say that past conduct authorized thereunder was not equally violative of the defendant's rights? [4] The answer to both these questions is that logic must sometimes give way to "reason[s] of practicality and necessity" (*People ex rel. Keitt* v. *Mc-*

[4] There is language in our recent holding in *People* v. *Grossman* (20 N Y 2d 346) which supports this reasoning. The retroactivity question was not argued in *Grossman* and we did not have an opportunity to reflect upon the most recent decision of the Supreme Court, *Stovall* v. *Denno* (*supra*). Any language in *Grossman* which is inconsistent with this opinion is expressly overruled.

Mann, 18 N Y 2d 257, 262). As this court observed in *People* v. *McQueen* (*supra*, p. 343): "The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past."

Our discussion heretofore has assumed that *Berger*, in fact, affected wiretapping provisions of section 813-a of the Code of Criminal Procedure. A majority of the court, however, is of the view that, while some of the language and the rationale of the *Berger* decision are applicable to all forms of eavesdropping, the specific holding of the case affected only the bugging provisions of the statute and that those portions authorizing wiretaps survive the *Berger* decision.[5] We therefore conclude, contrary to the defendant's allegation, that the order in question was not issued pursuant to a statute which was declared to be unconstitutional.

* * * *

This view of the holding of *Berger* is, we believe, supported by a careful reading of the opinion of Mr. Justice CLARK for the majority. The discussion of the *Olmstead* case is particularly instructive. To quote from the opinion: "The Court was faced with its first wiretap case in 1928, *Olmstead* v. *United States*, 277 U. S. 438. There the interception of Olmstead's telephone line was accomplished without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. *The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house.* Statements in the opinion that 'a conversation passing over a telephone wire' cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' have been negated by our subsequent cases as hereinafter noted. *They found 'conversation' was within the Fourth Amendment's protections,*

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[5] Where a portion of statute is held to be unconstitutional, the question of whether the other portions survive is one for the State courts. (*People* v. *Manucuso*, 255 N. Y. 463, 472; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Berea Coll.* v. *Kentucky*, 211 U .S. 45, 55.)

and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold." (388 U. S. 41, 50-51, *supra;* emphasis added.)

While Mr. Justice CLARK indicates that that portion of *Olmstead* which held that speech was not capable of seizure has been "negated" by subsequent cases, nowhere does his opinion state that the basis of the decision in *Olmstead* that wiretapping accomplished without an intrusion into the caller's premises infringes on no constitutional right —has been "negated" by any subsequent decision.

Indeed, as late as 1964 in *Clinton* v. *Virginia* (377 U. S. 158), the court adhered to the reasoning evolved in *Olmstead.* The court reversed a conviction obtained by the use of eavesdropping evidence involving a trespassory intrusion into a constitutionally protected area (*Goldman* v. *United States,* 316 U. S. 129; *Silverman* v. *United States,* 365 U. S. 505). And lest anyone think that *Olmstead* was overruled, since the court wrote no formal opinion, Mr. Justice CLARK wrote: "Since the Court finds that the 'spiked' mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment." (377 U. S. 158.)

The court's apparent intention, to stick to a distinction which can survive only as long as *Olmstead* remains viable, is evidenced in the closing paragraph of the *Berger* opinion. In attempting to allay fears that the *Berger* opinion would have the effect of outlawing all eavesdropping orders, Mr. Justice CLARK cited *Goldman* v. *United States* (*supra*) as an apparent instance of eavesdropping which would remain unaffected. *Goldman,* involving an eavesdropping accomplished without a physical trespass, relied solely upon the reasoning in *Olmstead* and strongly reaffirmed that decision.

While there is, as we have noted, language in *Berger* indicating that wiretapping may be held to be within the provisions of the Fourth Amendment this language hardly approaches the level of dictum and, since on the same day the Supreme Court decided *Berger* it enunciated the rule that "sound policies of decision-making" "[require] * * * that constitutional adjudications not stand as mere dictum" (*Stovall* v. *Denno,* 388 U. S. 301, *supra*), we con-

clude that *Berger* did not affect the wiretapping provisions of section 813-a of the Code of Criminal Procedure and that its decision affected only that "language [which] permits a trespassory invasion of the home, by general warrant, contrary to the Fourth Amendment" (*Berger* v. *New York, supra*, p. 64).

There remains for our consideration the second argument advanced by the defendant that the evidence should have been excluded because it was obtained in violation of section 605 of the Federal Communications Act. The Supreme Court has held, in the exercise of its supervisory powers over the Federal courts, that wiretap evidence is inadmissible in Federal prosecutions. The court has, however, held that the States are not required to exclude such evidence. The basis of this decision was outlined by the Chief Justice as follows: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." (*Benanti* v. *United States*, 355 U. S. 96, 101; see, also, *Schwartz* v. *Texas*, 344 U. S. 199; *Pugach* v. *Dollinger*, 365 U. S. 458.)

This statement, we believe, constitutes a complete answer to the argument advanced by the defendant that the wiretap evidence should be excluded in this State proceeding because its admission violates the Federal statute. If Congress did not intend to thwart a State rule of evidence, we see no compelling reason to exclude the use of wiretap evidence.

The defendant argues, however, that the very interception of the telephonic communication violates Federal law and that "At this time when the people of this state and country are being called upon to reaffirm their allegiance to the rule of law, it is a complete farce for the courts, prosecutors and police of this state to sanction such criminal behavior."

This argument is not without merit. If the issue were as simple as he suggests, a reversal would surely be mandated. Do we not, however, sanction criminal conduct and promote disrespect for law when we allow a man who is clearly guilty, who is convicted on the basis of evidence obtained in conformity with the strictest standards of the

Constitution, to go free and menace the security of law-abiding citizens? This is not to say that the ends justify the means and that proof of guilt sanctions violations of constitutional rights. But when the sole justification for the exclusion of evidence is that its admission will sanction criminal conduct and promote disrespect for law, we are obligated to consider whether the more desirable result will flow from excluding the evidence.

Moreover, we are dealing here with the violation of a statute which those charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against State officials who, acting pursuant to State law, violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, *New York Times*, Dec. 24, 1957, p. 10, col. 1.) If the statute is viable, let it be enforced. If the statute is flouted, let the offender be prosecuted. Because the constitutional provisions carried no penal sanctions to discourage violation, exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions.

In light of what can only be deemed a policy of nullification by Federal officials, a State court, we believe, is justified in questioning whether it should indirectly enforce a Federal statute which the Executive has consistently refused to enforce—a refusal the Congress has impliedly sanctioned. As the Supreme Court once observed: "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is written on the statute books, and to disregard the gloss which life has written upon it." (*Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369.) " 'Deeply embedded traditional ways of carrying out state policy * * *'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' " (*Poe* v. *Ullman*, 367 U. S. 497, 502.)

Under these circumstances we decline to hold that wiretap evidence obtained in substantial compliance with the strictest provisions of the Constitution of the United States and of this State must be excluded in criminal prosecutions in this State.

We have thus far been concerned with eavesdropping pre-*Berger* v. *New York (supra)*. In light of recent lower court decisions (see, e.g., *Matter of Intercepting Tel. Communications*, 55 Misc 2d 163), we feel it would be desirable to set forth what we believe to be the proper procedure as a result of the *Berger* decision. (See, e.g., *People* v. *Huntley*, 15 N Y 2d 72.)

We hold, in conformity with the traditional policy of this court to construe statutes in such a manner as to uphold their constitutionality (*People* v. *Epton*, 19 N Y 2d 496, cert. den. —— U. S. ——; *People* v. *Finkelstein*, 9 N Y 2d 342; *Matter of Coates*, 9 N Y 2d 242; *People ex rel. Morriale* v. *Branham*, 291 N. Y. 312; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150, p. 237, n. 97, and cases cited therein)[6], and in conformity with our specific policy of construing section 813-a so as to provide the same protections afforded by the Fourth Amendment, that, in addition to a showing of probable cause, an order issued under the statute must particularize to the extent possible the exact nature of the conversations sought, that it must provide for a return, that it must be severely limited in time, as outlined in *Berger*, and that it must provide for termination as soon as the conversations are seized. In addition, it should allege that exigent circumstances exist, viz., that the "destruction" of the object of the "search" will result unless the notice requirement is waived (*Ker* v. *California*, *supra*).

This rehabilitation of the statute is possible even though the Supreme Court struck the statute down on its face. In *Dombrowski* v. *Pfister* (380 U. S. 479) the Supreme Court enjoined the enforcement of a State statute on the ground that it was unconstitutional on its face. The action was taken at the behest of petitioners, who, like Berger, were found to have been "affected" by the statute,

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[6] As Chief Judge FULD recently wrote, this court "when faced with the choice of declaring a statute unconstitutional * * * or interpreting the legislation in such a way as to supply a missing constitutional safeguard * * * [has never] hesitated 'to embrace [the course] which will preserve [the statute's] validity.'" (*Bell* v. *Waterfront Comm. of N. Y. Harbor*, 20 N Y 2d 54, 62.)

although not necessarily directly deprived of any rights thereunder.

The language of the court, in indicating that the statute could be rehabilitated, is applicable here: "The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a non-criminal proceeding before it may seek modification of the injunction to permit future prosecutions" (380 U. S., *supra*, p. 491).

In the case at bar no such special proceeding to obtain a limiting construction of the statute is necessary, as we do not deal with a criminal statute.

We conclude by noting that, as a result of our construction of the statute, the people of this State are afforded greater protection against *all* forms of electronic eavesdropping, including that which involves no trespass whatever, than even the decisions of the Supreme Court have provided. Yet much as we might like, we cannot ignore the realities of life. We cannot ignore the rise of organized criminal activity and "families" who promise to provide the true "big brothers" of 1984. As the facts in this case reveal, some intrusion under the most severely regulated and restricted conditions are necessary, lest the only security we enjoy is that from government intrusion. This was the conclusion of the President's Commission on Law Enforcement and Administration of Justice, 200-203 (1967) and it is our conclusion today.

We have examined the remaining arguments raised by the appellant and find that they do not warrant reversal (*People* v. *Kingston*, 8 N Y 2d 384).

The judgment appealed from should be affirmed.

Chief Judge FULD (dissenting). The decision which the court is now making, I suggest, disregards both the holding and the spirit of *Berger* v. *New York* (388 U. S. 41). The eavesdropping statute—section 813-a of the Code of Criminal Procedure—held invalid in that case is the very same statute under which the ex parte wiretapping order in the case before us was granted. The Supreme Court there ruled that section 813-a was "deficient"

and unconstitutional "on its face" as an impermissibly broad and sweeping intrusion into the constitutionally protected area of individual privacy (388 U. S., at pp. 44, 55). If this language has any meaning, it is that the statute is invalid in its entirety insofar as it authorizes eavesdropping, whether the particular form of such eavesdropping be "bugging" as in *Berger* or wiretapping as in the present case. Moreover, there cannot be any doubt that the dominant considerations on which the *Berger* decision was predicated are equally applicable to both of these types of surreptitious interception. In my judgment, it is the impermissible intrusion into the privacy of conversations, not merely an unlawful physical entry, that is and should be proscribed and outlawed. (Cf. *Katz* v. *United States*, 369 F. 2d 130, cert. granted 386 U. S. 954.)

The Supreme Court found section 813-a to be constitutionally "offensive" in at least four respects. First, it improperly authorized eavesdropping "without requiring belief that any particular offense has been or is being committed" and, in effect, gives "the officer a roving commission to 'seize' any and all conversations" akin to the old repudiated "general warrant". Second, the statute's "authorization of eavesdropping for a two-month period [was] the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause". Third, "the statute place[d] no termination date on the eavesdrop once the conversation sought is seized." And, fourth, the statute "ha[d] no requirement for notice as do conventional warrants" and did not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties" (pp. 59-60). "In short," the Supreme Court summed up the matter, "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures" (388 U. S., at p. 60).

Quite obviously, the defects which the court pointed to exist whether section 813-a be invoked as authorization for bugging or for wiretapping. In fact, the Supreme Court failed to make any distinction between bugging and wiretapping other than to observe that they were

both forms of eavesdropping which developed at different times (388 U. S., at pp. 45-47). The court did, it is true, refer to its 1928 decision in *Olmstead* v. *United States* (277 U. S. 438) in which wiretapping, in and of itself, was held outside of the protective ambit of the Fourth Amendment. The court in *Berger*, however, expressly held that *Olmstead* was no longer sound law insofar as it differentiated between "conversation" and tangible property. The court thus noted that statements in the *Olmstead* opinion to that effect had been "negated" by later decisions which held that "the use of electronic devices to capture * * * ['conversation'] was a 'search' within the meaning of the Amendment" (p. 51).

Although the court in *Berger* did not, in so many words, overrule the other basis for the *Olmstead* decision—that wiretapping did not per se entail a physical invasion of private premises—it is evident from a reading of the *Berger* opinion that that aspect, too, has little, if any, remaining force. The thrust of the *Berger* opinion, indeed its underlying theme, was that eavesdropping, the generic term encompassing wiretapping and bugging is within the ban of the Fourth Amendment not because it may constitute a trespass in the technical sense but because "[b]y its very nature * * * [it] involves an intrusion on privacy" of unduly broad scope (388 U. S., at p. 56).[1] "Few threats to liberty exist", the court declared (p. 63), "which are greater than that posed by the use of eavesdropping devices." In this regard, it is significant that both Justice DOUGLAS, in concurring (p. 64), and Justice BLACK, in dissenting (p. 80), regarded the *Berger* decision as necessarily overruling *Olmstead* and that Justice WHITE, in his dissent (p. 113), viewed the issues presented as not turning on whether it was bugging or wiretapping which happened to be involved.

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[1] In its discussion of *Silverman* v. *United States* (365 U. S. 505), it was pointed out that in that case, "[s]ignificantly, the Court held that its decision did 'not turn upon the technicality of a trespass * * * as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area'" (388 U. S., at p. 52).

Once it be determined that section 813-a of the Code is unconstitutional in its entirety, the impact of *Berger* may not properly be avoided by holding that it is not to be applied to cases (such as this) which come to our court in the normal course of the appellate process, even though the trials antedated that decision. I can add little to what Judge CHRIST has so ably stated on the subject in his dissent in *People* v. *Morhouse* (21 N Y 2d 66, also decided today). In *Berger*, the Supreme Court held that evidence obtained pursuant to section 813-a was the product of an illegal search and seizure in violation of the Fourth Amendment, and we have consistently held, with respect to such evidence, that the exclusionary rule announced in *Mapp* v. *Ohio* (367 U. S. 643) should be applied "in our review of pending appeals," despite the fact that the trial took place before *Mapp* and were conducted in the light of the law as it then existed. (*People* v. *O'Neill*, 11 N Y 2d 148, 152; see, also, *People* v. *Loria*, 10 N Y 2d 368, 371; *People* v. *Muller*, 11 N Y 2d 154.) In *People* v. *McQueen* (18 N Y 2d 337), it is true, the court declined to give retrospective application to the new rules enunciated in *Miranda* v. *Arizona* (384 U. S. 436) concerning the use of confessions obtained by police interrogation but we neither held nor intimated that our prior practice in search and seizure cases should be modified. In point of fact, just a few months ago—and, of course, after *MCQueen* (18 N Y 2d 337, *supra*)—our court in *People* v. *Grossman* (20 N Y 2d 346), involving the very statute now before us, wrote that, since *Berger* had held section 813-a unconstitutional, "it is as if there had never been any valid authority for the police to act as they did" (p. 349).[2] To change the practice to the prejudice of the defendants now before us (Kaiser and Morhouse) is highly unfair, if not unconstitutional, smacking as it does of unequal protection of the laws.

Although there may be some situations in which prospective application of a new rule may be dictated by the

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[2] The majority avoids this pronouncement by blandly declaring (opn., p. 99 n. 4) that "[a]ny language in *Grossman* * * * inconsistent with this opinion is expressly overruled"!

fact that the police placed "reliance" on old rules or prior decisions, the present is not such a situation. The Supreme Court, it is true, had not previously ruled that evidence obtained by means of wiretapping could not be used in a State court. But it had, repeatedly and for many years, held that the tapping of telephone wires and the disclosure of the contents of the communications intercepted constitute a crime under section 605 of the Federal Communications Act. (See, e.g., *Benanti* v. *United States*, 355 U. S. 96, 100.) Manifestly, in such a situation, the prosecution should not be permitted to make the criminal conduct of its agents a basis for a claim of "reliance" on the prior state of the law.

As the majority here acknowledges, the order permitting the wiretap in the present case contained many "defects" (opn., p. 97) of the kind which the Supreme Court in *Berger* held to be violative of essential constitutional safeguards. The order broadly authorized the interception and recording of "*all telephone communications made by* and to Salvatore Granello, Dino Conte and *any and all other persons* communicating by both incoming and outgoing calls over the telephone located at 255 W. 43rd Street, New York County, New York * * * [*from July 1*] *until the 29th day of August, 1964.*"[3] As is manifest—and I cull from the opinion in *Berger* (388 U. S., at p. 59)—the effect was to give the officer "a roving commission", on the order of a general warrant," to 'seize' any and all conversations". Moreover, the order, as indicated, was to be effective for two months, a length of time expressly condemned by the Supreme Court in *Berger;* as the court pointed out, "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." * * * During such a long and continuous

[3] The order further provided that the Nassau County District Attorney or his agents were "authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instrument that the said District Attorney * * * [and a named assistant district attorney] or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire".

(24 hours a day) period the conversations of any and all persons * * * will be seized indiscriminately and without regard to their connection with the crime under investigation" (p. 59). And, since its success necessarily depends on secrecy, the procedure authorized by the order has—and I again quote from the *Berger* opinion (p. 60)—"no requirement for notice as do conventional warrants" and does not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties."

The majority has attempted to overcome the objections voiced in *Berger* by a suggested retrospective re-interpretation of section 813-a to narrow its unconstitutionally broad reach. As support for this "rehabilitation" of the statute, the majority points to *Dombroski* v. *Pfister* (380 U. S. 479). That case, posing an entirely different problem, is wholly inapposite. It involved an excessively broad State statute, regulating speech and expression, which had not yet been construed by the State courts. In upholding the power of a Federal court to enjoin criminal prosecution under that statute so long as its wide reach remained unlimited by construction, the Supreme Court left open the possibility of the State's obtaining "an acceptable limiting construction" from the State courts "in a noncriminal proceeding" for the purpose of future prosecutions (380 U. S., at pp. 491, 497). Here, in sharp contrast, the applicable statute had been authoritatively construed by this court in *Berger* (18 N Y 2d 638) and had, on the basis of that construction, been held unconstitutional on its face by the Supreme Court (388 U. S. 41, *supra*). I have come on no case, and none has been called to our attention, in which a State court has presumed to resuscitate a statute by a retroactive re-interpretation after the United States Supreme Court had (as it has done here) declared it constitutionally dead.

In any event, though, even if we were to assume that a court has such power, it is impossible to view the majority's interpretation in this case as "an acceptable limiting construction". Thus, the court's opinion herein does nothing more than to outline, in general terms, the limitations which it proposes to read into the statute, and has

apparently left the precise delineation of such limitations to future judicial decision. The Supreme Court in *Berger*, however, made it plain that it would not uphold any legislation authorizing eavesdropping which did not embody " 'precise and discriminate' requirements" sufficient to comply with the strict demands of the Fourth Amendment (388 U. S., at p. 58). The limitations here suggested are entirely too vague and indefinite to satisfy that criterion. Actually, the proposed "rehabilitation" would consist not merely of engrafting on the statute "a missing constitutional safeguard", as was the situation in *Matter of Bell* v. *Waterfront Comm. of N. Y. Harbor* (20 N Y 2d 54, 62; see, also, *People* v. *Epton*, 19 N Y 2d 496), but of completely rewriting the statutory language and adding, under the guise of construction, matters of detail which are more appropriately left to legislative action.

In this connection, I must say that I do not understand how our court may legitimately fashion a "procedure" for wiretapping and for the issuance of orders permitting such wiretapping. The Legislature has outlawed all wiretapping except that authorized by section 813-a (see Penal Law, § 250.00, subd. 3; § 250.05 [formerly §§ 738, 739]) and has expressly provided in CPLR 4506 that evidence obtained by wiretapping (or other eavesdropping) without a court order issued pursuant to that statute, "shall be inadmissible for any purpose in any civil or criminal action". Beyond that, since the revisers of this State's Code of Criminal Procedure have already drafted and proposed an article (art. 370), to replace section 813-a, which "precisely set[s] forth the forms and procedures to be followed at each phase of eavesdropping, from application through termination to judicial record-keeping", and contains "a number of restrictions in the utilization of eavesdropping not previously found in New York law nor specifically called for in the *Berger* decision,"[4] it seems

[4] See Proposed New York Criminal Procedure Law (Temporary Commission on Revision of Penal Law and Criminal Code, 1967), art. 370, p. 401. The Staff Comment recites (p. 402) that "this article provides a comprehensive scheme for the restricted issuance of eavesdropping warrants, based upon strict standards of

to me unwise, if not mischievous, for a court to undertake to assume what is a strictly legislative function.

Further, and quite apart from the combined impact of the *Berger* decision and CPLR 4506, I am more than ever confirmed in the view I expressed in dissent in *People* v. *Dinan* (11 N Y 2d 350, 356) that all evidence obtained through wiretapping should be excluded on the ground that its very introduction in open court constitutes a Federal crime in violation of section 605 of the Federal Communications Act. (See, also, *People* v. *McCall*, 17 N Y 2d 152, 160, concurring opn.; *People* v. *Cohen*, 18 N Y 2d 650, 651, dissenting opn.)

In sum, then, since section 813-a has been invalidated and stricken in its entirety, no authorization existed for the ex parte order permitting wiretapping in this case. Consequently, CPLR 4506 requires the exclusion from evidence of the conversations intercepted by means of such wiretapping.

The judgment appealed from should be reversed and a new trial ordered.

Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and BREITEL concur with Judge KEATING; Chief Judge FULD dissents and votes to reverse and order a new trial in a separate opinion.

Judgment affirmed.

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probable cause and necessity, and demanding scrupulous particularity in the description both of the person and place upon which the eavesdropping is to be conducted and the nature of the evidence sought thereby."

IN THE SUPREME COURT OF THE UNITED STATES

BEFORE: HONORABLE STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

—against—

THOMAS R. KAISER, PETITIONER

The above named petitioner having been heretofore on the 12th day of August, 1966, convicted of the crimes of Conspiracy To Commit Extortion, Attempted Extortion and Coercion after a trial at the County Court, Nassau County, and sentenced on the 12th day of August, 1966 to the State Prison for a term of not less than one and one-half years nor more than seven years, and said judgment having been affirmed by the Appellate Division of the Supreme Court of the State of New York on May 15, 1967, and, upon appeal to the Court of Appeals of the State of New York, the judgment of conviction and sentence for the crimes aforesaid having been affirmed on December 7, 1967, and the petitioner having made application for a stay of the execution and enforcement of the judgment of the Court of Appeals of the State of New York pending the making and determination of a Petition for Certiorari to the Supreme Court of the United States and the making of an application for a further stay from a Justice of the said Supreme Court, and after hearing PETER L. F. SABBATINO, ESQ., and HENRY J. BOITEL, ESQ., attorneys for the petitioner, and HENRY P. DEVINE, Assistant District Attorney of Nassau County, for the People, it is hereby,

ORDERED, that the Judgment heretofore issued herein on the 7th day of December, 1967, be, and it hereby is, in all respects, stayed for a period of 40 days from the date hereof in order to enable the petitioner to apply to the Supreme Court of the United States, or to a Justice thereof, for a further stay, or for such other relief as may be required; and it is further

ORDERED, that the bail heretofore fixed in the sum of $40,000.00 for the petitioner be and it hereby is continued for the aforementioned period of 40 days; and it is further

ORDERED, that the original of this order be filed in the office of the Clerk of the County Court, Nasau County, and that a copy hereof be served upon the District Attorney of Nassau County, and the Clerk of the Court of Appeals of the State of New York forthwith.

Dated: New York, New York, February 2, 1968.

/s/ Stanley H. Fuld
Chief Judge of the Court of Appeals.

SUPREME COURT OF THE UNITED STATES

No. 1451 Misc., October Term, 1967

THOMAS R. KAISER, PETITIONER

v.

NEW YORK

On petition for writ of Certiorari to the Court of Appeals of the State of New York

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1350 and placed on the summary calendar.

April 22, 1968

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MAR 28 1968
JOHN F. DAVIS, CLERK

PETITION NOT PRINTED

IN THE

Supreme Court of the United States

October Term, 1967

[redacted] 62

No. ~~1451 MISC.~~

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM CAHN
District Attorney Nassau County
Attorney for Respondent
County Court House
Mineola, New York

HENRY P. DEVINE,
Assistant District Attorney,
of Counsel.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Evidence	3
The Corpus Delicti	5
The Kaiser's Involvement	14
Exhibit 8A	15
People's Exhibit 9B	17
The Writ Should Be Disallowed	18
APPENDIX A	1a
APPENDIX B	30a
APPENDIX C	59a

Cases Cited

Benanti v. United States, 55 U.S. 96	22, 23
Berger v. New York, 383 U.S. 41	3, 19, 20, 22, 24, 25
Dombrowski v. Pifster, 380 U.S. 479	19
Escobedo v. Illinois, 378 U.S. 478	21
Katz v. United States, — U.S. —, 88 S.Ct. 507	19, 21, 22, 23
Osborn v. United States, 385 U.S. 323	21, 22, 26
People v. Giro, 197 N.Y. 152	21
Pugach v. Dollinger, 365 U.S. 458	21, 23
Schwartz v. Texas, 365 U.S. 458	21
Stefanelli v. Minard, 342 U.S. 117	23

Other Authorities Cited

	PAGE
Federal Communications Act (47 U.S.C. Sec. 605)	3
New York Code of Criminal Procedure, Sec. 813-a	3
Orfield, Criminal Procedure under the Federal Rules, Sec. 26:881	23
3 Wigmore on Evidence, Sec. 821	21
6 Geo. Wash. L. Rev. 326 (1938)	22
15 N.Y.U. L. Rev. 279 (1938)	22
16 U. Fla. L. Rev. 120, 121 n. 10 (1963)	22
24 Va. L. Rev. 451 (1938)	22
26 Ill. BJ 376 (1938)	22
28 U.S.C. Sec. 1257 (3)	2
34 Ill. L. Rev. 758 (1940)	22
51 J. Crim. L. C & PS 441 n 14 (1960)	22
52 Mich. L. Rev. 430 (1954)	22
53 Harv. L. Rev. 863 (1940)	22
57 Colum. L. Rev. 1159 (1957)	22

IN THE

Supreme Court of the United States

October Term, 1967

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against

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To: *The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States*

The petitioner, Thomas R. Kaiser, prays that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered December 7, 1967.

Opinions Below

The majority opinion for the New York State Court of Appeals was written by Judge Keating and was concurred in by five Associate Judges. The majority opinion is reported in 21 N.Y. 2d 86 and is reproduced in Appendix A of the brief.

Sure enough, just as Albino predicted, the Gallos were called off whereupon Granello then announced that Holzman owed him $3,500 for his efforts.

According to Holzman (1502, *et seq.*), he gladly paid the $3,500 without complaining to the authorities out of fear for the Gallos. How the $3,500 was divided up between Granello and the Gallos remains one of the mysteries of the decade.

In point of time, the next significant event occurred in 1963 when the appellant, Thomas R. Kaiser, purchased a bar and grill in the Jamaica-Richmond Hill area in connection with which he borrowed a sum of money from Holzman who owned the juke box and shuffle board then in the premises. In return for the loan, Kaiser signed a contract with Holzman, continuing the Holzman machines in the newly purchased bar.

The contact with Holzman was made by Kaiser through Robert Luttman, an employee of Holzman, and the arrangement was typical of those prevailing in the coin machine industry in Metropolitan New York (999-100).

Kaiser admittedly was a long time friend of Dino Conte, who managed or hung out in the Headline Lounge on 43rd Street in Manhattan. It was Conte who introduced Kaiser to Granello in April of 1964 at the Headline Bar. According to Kaiser, he knew Granello as Sally Burns (1887).

In May of 1964, Conte brought up Holzman's name in a conversation and quizzed Kaiser regarding Holzman's private life, his business ventures, partners, the extent of his business holding and enterprises, a well as Holzman's overall financial condition (1916-17).

Kaiser maintained that he knew nothing then about Holzman personally or his private business (1901-1903).

The record (*supra*) is quite clear that as a result of this conversation with Conte and probably at Conte's urgings,

Kaiser used his friendship with Robert Luttman, Holzman's trusted employee, to ferret out the information clearly proving that Irving Holzman by 1964 possessed a very substantial investment in the coin machine industry in the greater New York area. The result of the Kaiser probings established that Holzman was a man of very considerable means. Indeed, Holzman was now placed in the million dollar class by the conspirators.

Kaiser frankly conceded he knew Granello was then contacting Holzman (1922), although he steadfastly denied that he had guilty knowledge that Granello and Conte were using the intelligence gained by Kaiser from Luttman and passed by Kaiser to Conte, to extort $25,000 for the "family" and 25% of Holzman's business for themselves.

The Corpus Delicti

For the reason that Kaiser does not claim that *no* crime occurred or that *no* offense or wrong was committed by Granello or Conte, we shall go directly to the principal items of evidence relied upon to spell out the attempt by Granello to extort $25,000 cash from Holzman and to cut himself in for a quarter of all of Holzman's business.

The prosecution resorted in the first instance to the testimony of the victim, Irving Holzman, (991, *et seq.*) who testified he was both a distributor as well as an operator of coin operated equipment in the Bronx, Manhattan, Kings, Queens, Nassau and Suffolk Counties.

Sometime during the morning of June 4, 1964, Conte came to Holzman's New York office where he introduced himself as a partner of Granello and told Holzman that Granello wanted to see him. Holzman replied if Burns wants to see me, tell him to stop by the office.

Granello phoned Holzman and agreed to have lunch with Holzman at his New York office, but the luncheon never came off.

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Granello phoned Holzman and agreed to have lunch with Holzman at his New York office, but the luncheon never came off.

The weekend came and went and on Monday, June 8, 1964, Holzman left his home in Roslyn as was his custom for his New York office. While on the way to the City, his wife was assaulted in her Roslyn home by a gang of young toughs posing as delivery men.

The fact of the attack was testified to by Holzman's wife, Ruth, (533, *et seq.*) and a neighbor, Ann Rettek, (522) who while walking the dog, saw the attackers and heard Mrs. Holzman's screams for help in her home.

When Holzman arrived at his New York office, he was notified of the assault on his wife and returned immediately to his residence in Roslyn. It was at this point that Holzman learns that Granello has been looking for him so he telephoned Granello who told him that he would not talk to him on his home phone, but that he should go to an outside phone and call him back which he did (1034).

Granello told Holzman that he wanted to see him and that they could have lunch at Charles French Restaurant which Holzman refused to do because of the assault on his wife.

According to Holzman, he now became suspicious, first because Granello suddenly reappeared in his life, and then his wife is mysteriously beaten; so he called Granello and agreed to meet him at Charles French Restaurant that same Monday afternoon.

The meeting took place and Granello immediately volunteered that he learned about Mrs. Holzman's beating from a radio report on the way back to New York Monday morning from his summer place at Greenwood Lake. Further, that if he, Granello, had returned on Sunday (1039):

> "I could have avoided this whole thing because the people I am with are animals."

Continuing Holzman testified Granello declared (1039, 1041, 1041):

"'You know, I hear that you grew into the million dollar class and nobody who gets in that class doesn't have somebody with him.'

He says, 'Even Costello had to give up a piece.'

Q. Did he say who he meant by Costello? A. No, but I assumed that he was talking about Frank Costello. That's the way it sounded.

Q. He said even Costello had to give up a piece? A. Yes.

Q. Go ahead. A. Then he says to me, he tells me that it was me, it wasn't my wife that people came into the house for and gave her that beating, it wasn't my wife they were looking for, *it was me.*

He says, 'They were looking for you' and he says, 'There are certain people who think they should have a piece of you and I figured out that—'

Mr. Bouse: I move it be stricken.

The Court: This is the conversation.

Q. This is Granello saying? A. Yes.

The Court: Overruled.

Q. In other words Granello figured out?

Mr. Bouse: Oh, I didn't understand that this is Granello who figured it out.

Q. This is his actual words? A. Yes, he said, *'I figured out the best thing you do, you come up with $25,000 in cash for the family'* and he says, *'I don't talk about the family to everybody.* I am talking to you about it because I trust you with anything and then *you will give me 25% of all your business,'* and he says, *'I don't mean by building an equity of 25% and I don't mean of a small percentage,'* he says, *'Because Sally Burns pisses away 100 a day'.*" (Italics mine.)

Holzman replied that he would have to think it over; that he had a partner and he could not understand why he had to give $25,000 to some "family" or take in a partner.

As Holzman left the restaurant, he saw Conte at the bar drinking with a redhead.

Holzman now knew he was in real trouble so he immediately reported the threat by Granello to the Nassau County authorities (1043), and with Holzman's permission, Holzman's home phone was monitored.

Pursuant to direction, Holzman called Granello who again advised Holzman to call from an outside phone which Holzman agreed to do. The phone in question was a public pay phone in the Oak Pharmacy nearby the Holzman residence in Roslyn. The calls made from Holzman to Granello from the public pay booth in the pharmacy were all monitored with Holzman's consent. Pursuant to Police direction, Holzman repeated that he would not give $25,000 to the "family".

Conte then called Holzman at Holzman's home and told him to call Granello again, and between Granello and Conte they advised Holzman that Granello could be reached at Patrissey's a restaurant on Mulberry Street in downtown New York or at the Headline Bar.

Holzman pursuant to Conte's direction, then phoned Granello at the Headline Bar to tell him that he could not then meet Granello because of his wife's fear and physical condition resulting from the beating. Holzman stayed in his home through the weekend which takes us up to Monday, June 15, 1964, when he went to New York where he met Granello for a second time at his New York office. Holzman was then being shadowed by the captain of his pleasure boat, who Holzman pretended was a detective. Holzman again told Granello that he did not need any partner and would not give Granello $25,000. According to the witness, Granello agreed to reduce Holzman's contribution of $25,000 to the "family" to $12,500 with the promise that Granello would make up the difference if Holzman would make Granello a 25% partner in all of his business ventures. Holzman refused.

On Thursday of the same week, June 18th, Holzman met Granello again in his New York office, and Granello demanded then and there $5,000 for the "family" by Friday night to show the "family" good faith (1215-1219).

The ruse then being carried on by Holzman with regard to Captain Ambler, his boat captain, had by now been discovered by Granello, and Granello advised Holzman that he did not need a detective as he could straighten everything out (1217).

Holzman testified at this point he was truly frightened of Granello and was stalling as long as he could, but Granello kept insisting on the $5,000 for the "family" (1223).

On the following Monday, which would be June 29, 1964, Granello phoned Holzman at his home and Mrs. Holzman answered. When she realized it was Granello, Mrs. Holzman declared that if he did not leave them alone, that she was going to the Federal Bureau of Investigation.

By now, it was becoming obvious to Granello that Holzman was no easy pickings so on the very next morning, Holzman's married daughter, Dolores Billing (939, *et seq.*), who resided with her husband, Ronald, in Plainview in the Town of Oyster Bay, received a telephone call and was threatened (953).

> "If your father doesn't cooperate we'll come to Sylvia Lane and kick your fuckin' pregnant belly in."

Thereafter, there were a whole series of calls between Holzman and Granello wherein Granello tried to induce Holzman to come to New York City to talk, which, of course, Holzman did not fall for.

It was at this juncture that Holzman's New York office was bugged with Holzman's consent, and a meeting with Granello was held on Monday, July 2nd.

The tape recording of the bugged conversation was transcribed by an official Grand Jury stenographer and copies were made available to each member of the jury as well as defense counsel and the judge so that all could follow the playing of the tape in the courtroom. The tape itself was People's Exhibit 7 whereas the transcript is People's Exhibit 7A. The tape recording as played for the jury was recorded and will be found in the record on appeal starting on page 1283. The tape conversation demonstrates clearly and unequivocally the nature and quality of the pressure that Granello was bringing to bear on Holzman. It is shot through with innuendo and inference that is susceptible of only one conclusion, and that is, Holzman should pony up the $25,000 for the "family" as well as make Granello his partner.

For example, when Holzman tells Granello that his associate, Joey Albino, does not want a partner, Granello replies that he told Rocky Graziano to speak to Joey Albino (1286; 1328-1329).

Any doubt or curiosity remaining regarding the true meaning and intentions of Granello are cleared up conclusively by People's Exhibits 9 and 9A, a taped telephone conversation and typewritten transcript thereof between Conte and Kaiser regarding the beating of Albino, the Holzman ally.

Even more enlightening was the bugged conversation of the meeting between Granello and Holzman in Holzman's New York office wherein Holzman atempts to find out from Granello what "family" is coming into his business, uninvited and for free with Granello. The tape and transcript thereof are People's Exhibits 7 and 7A, respectively.

Granello in what could easily be an Amos-Andy dialogue, if it was not for real, does not want to reveal the "family" in question. Holzman is told outright by Granello (1294):

"No, you can't know that * * * that's impossible, you can't know because, uh, no matter what happens you can't know * * *."

It appears that at times Granello himself becomes desperate undoubtedly because he has made certain promises to the "family" regarding Holzman that now seem to be slipping through his grip. For example, Granello reminds Holzman that (1300):

"There are people from the past that felt that they have interest in you * * * and there's more than one person, and I'm not going to mention their names * * *."

Granello of all things then agrees to put up one half of the $25,000 going to the "family" if Holzman will only capitulate.

Holzman, of course, now wants to know why Granello suddenly will pick up one half of the tariff going to the "family". Granello replies (1313):

"This would clear the road for me to be with you; not that I am paying a shake to be with you. I don't * * * but in this instant, the people that are involved, I want to clear them up and they have no interest in you, and there can be no further bullshit or nonsense, and this is not a sha- you may look at it as a shake. You say what am I paying? What are they giving me?"

The great trouble is Granello couldn't or wouldn't answer his own questions about "they".

The reason for Granello's hesitancy, if not fright, appears in the very next exchange. Holzman inquires of Granello (1314):

"Is this got anything to do with this, with this guy with the cigar over in Woodside, over in Corona, or wherever it is?"

Granello replies (*supra*):

> "Don't ask, don't ask me that. Don't ask me these questions. I'm not going to answer them."

The man "with the cigar over in Woodside" is none other than Mike Miranda, a consigliere in the Vito Geneovese "family". The reason Holzman confronted Granello with Mike Miranda is because Dino Conte on June 4th, when he first contacted Holzman, brought Mike Miranda into the situation (1347-1348).

So it was that Holzman probing to learn the identity of the "family" about to extort $25,000 in cash from him and muscle in on his business, said to Granello (1314):

> "When your man, Dino, was here • • • he mentioned that—uh—Miranda situation."

At the mere mention of Mike Miranda's name, Granello replied (1314):

> "Listen, I don't—I don't want you to ask me no, none of them kind of questions. I'm just going to tell you one thing; and I'm going to tell you; don't mention nobody's name. I don't want nobody's name mentioned."

It is perfectly obvious why Granello does not want "nobody's name mentioned". "Nobody" is Mike Miranda of the Vito Geneovese family.

In Cuba, Granello, according to Granello, was the "jefe" or "boss" (1315-1316), but the suspicion looms large that in Corona or Woodside, Granello's posture with the "family" is slightly different.

Holzman finally closed the door forever when he telephoned Granello at Patrisseys on Mulberry Street. A tape and transcript, People's Exhibits 8 and 8A corroborate beyond all doubt Holzman's testimony that Granello's efforts were nothing less than an attempt to extort $25,000 from

him for what was probably the Vito Genovese family through Mike Miranda, a consigliere, plus 25% of Holzman's business.

Numbers 1 and 2 appearing on People's Exhibit 8A are the voices of Holzman's and Granello's respectively. Of course, the court's attention is directed to the entire transcript, although the flavor is circumscribed by this brief exchange (1376-1377):

"1—we're not going to take in any partners, and I can't take in any partners—

"2 O.K., buddy.

"1—in this business.

"2. Now, I'm going to tell you something—

"1 Yeah.

"2—see. Now I'm going to tell you something, See, Irving, see, you used me pretty good and, uh, uh, now, I'm going, I'm going to tell you something and you could do what you want, go whichever way you want. And it ain't a threat. It's a fact, see. Uh, if you think you're going to play with me you're making a big mistake. Now I tried to work out everything the way you want it, but I see you're taking like an inch at a time. I want to extend myself, but if that's the way it's going to be then you better go and get who you going to get. Understand what I mean? Go to the, uh, Cahn or the FBI or whoever you want 'cause *you're going to need them.* Do you understand that? Do you hear me?

"1 Yeah, I hear you.

"2 O.K. And, uh, if you think you're going to use me and you're going to play games with me, you ain't capable, see. You may think you are, and I'm trying to be nice, but I could see with you that there's only one way with you and *I am just going to unleash the people and let them do what the fuck they want with you,* you understand? Because I could see what it is with you, see. And you want to play with me that way, which you shouldn't do, and I told you not to do it. You wanted—*now you've incurred my wrath,* you see. And we'll see who's going to come out on top. Because *anybody that's associated with*

you is going to wind up in the fuckin' hospital. And you'll see a fury that you never saw in your life and this is coming from Mr. Burns himself. You understand?

"1 Yup.

"2 So when you, when you going to tell your people, you tell them that it's from me. You understand, Irving?" (Italics mine).

The Kaiser's Involvement

There can be no doubt that as between Granello, Conte and Kaiser, Granello was the "jefe", Corona notwithstanding. Nevertheless, it is clear beyond cavil that Kaiser was a knowing participant in the efforts of Granello and Conte to extort $25,000 from Holzman and to cut themselves in for 25% of Holzman's business ventures.

Proof of this fact stems principally from two telephone conversations between Kaiser and Conte which were intercepted and recorded from the phone at the Headline Lounge. The transcripts in question are People's Exhibits 9A and 9B.

Because the exhibits constitute the essential proof that Kaiser well knew the purpose for and manner in which the information acquired by him from Bob Luttman was being used by Conte and Granello, and especially because the judgment roll was not printed, we shall, for the convenience of the Court, reproduce as an appendix of our brief, both transcripts in toto.

Kaiser is calling in both cases from Kitty City in the old Flushing Meadow area where Kaiser apparently worked as some kind of guard or bouncer.

The voices on both transcripts are numbered 1 and 2. In each case, the numerals represent Kaiser and Conte, respectively.

We shall, for the further convenience of the Court, give a short summary of both conversations.

Exhibit 8A

The conversation opens with a discussion of the possibility that Joey Albino, Holzman's aid, might have been threatened or beaten by Granello who is referred to throughout both conversations as "Sally" or "the man", and the conclusion is it would have been wrong for Albino to have been assaulted.

Suddenly, Kaiser volunteers that:

> "There's no question McGloyne's still alive. He's over here [Kitty City] wth his whole fucking gang of kids."

Conte and Kaiser then turned the discussion to the efforts to extort the $25,000 from Holzman and to get a piece of Holzman's business, and both agree that the conspiracy should be abandoned because Sally handled the operation badly. There can be no doubt that Kaiser was thoroughly disgusted with the methods resorted to by Sally and the crude way that Sally used the secret information acquired by Kaiser from Bob Luttman, an employee of Holzman. Kaiser's concern developed over the fact that Holzman would have to be a moron not to suspect that it was Bob Luttman who was feeding the information on Holzman that Sally used to make his criminal judgments.

Kaiser obviously had wanted to protect Luttman from Holzman and was upset because he believed that Luttman would be fired.

Kaiser then complained that:

> "If it [the shake] would have been handled the way I told you in the fucking beginning, it would have been done and it [the extortion] would have been over with now."

Kaiser was obviously bitter because Sally did not, as he suggested, bring:

> "in an outside element like I told him to * * * to straighten it out; instead of just walking in there, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last."

Both Kaiser and Conte were of a mind that the attempts to extort the money from Holzman should now be dropped, but it then appears that Kaiser exercised a second thought and suggested:

> "What I would do is maybe wait a month."

Conte obviously disagreed, and they went back to the subject of who was to blame for blowing the criminal efforts to extort $25,000 for the "family" and to get 25% of Holzman's business. Both Kaiser and Conte disavow any responsibility. Indeed, Kaiser declares:

> "It wasn't handled by me badly, * * * the fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly."

Boasting a little bit, Kaiser then stated:

> "I brought, I brought, the man over a shot for you and for him * * *."
>
> "So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong."
>
> "Well, well, let him go to Cahn. Because there's nothing they can do cause Sally's forgetting about it."

Apparently, Kaiser and Conte believed that with the abandonment of the conspiracy by Granello, there was no criminal liability and that no violation occurred unless the money had been paid.

People's Exhibit 9B

The second conversation is as truly bizarre as any that has come to the attention of this office in this decade. For in it, Kaiser and Conte discuss, amongst other things, the selection of a new and different "victim" who might satisfy their criminal greed. On this score, the Court is referred to the following exchange between Kaiser, again speaking from Kitty City, in the Douglaston area, to Conte at his bar in the Times Square area of Manhattan.

> "Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place [Kitty City]. Well, fine one. Jesus, I'm starving over here. Pulling out of this fucking driveway here. Find a victim there. That's for sure. Sure, we got to find a victim. Now, we, we lost Holzman so now we got to find another victim. Find somebody else out there. Well, we'll see what else come up. Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks. Well, just be careful now, that's all, be fucking careful."

Kaiser and Conte then talk about "this thing that time on Park Avenue" and Kaiser brought up the subject of "Max Factor" the manufacturer of cosmetics, as he referred to the fact that when he was in a drug store, and:

> "I saw a picture of Max Factor. * * * I wonder if he's got any money. * * * He's, he's pretty big in that business, too, you know. * * * When I come over I'll tell you about it what this guy told me."

They then discused the fact that Holzman was "fucking terrified" and staying in his home and not coming to New York.

As a matter of fact Conte remarked that Holzman "can never walk into New York again he knows that."

They also discussed the fact that Sally flew to Chicago to see a "Lyn Durant" about Holzman.

Continuing they discussed the fact that Holzman will not be able to hold the operating part of his business, that is, the Routes unless he services the equipment in the various bars and grills throughout Metropolitan New York, and this he cannot do while he is buttoned up in his home. Further, that they believed that this is what Sally now has in mind.

Both Kaiser and Conte then discussed the money that Holzman paid to Granello because of the "Gallo business". Kaiser then remarked that Sally was "terrorizing" Holzman.

> "He told him uh, he says 'I'll guarantee you you can't come to New York'."

This then is the general flavor of the conversation between Kaiser and Conte.

It is little wonder then why in the face of the evidence, not merely out of the mouth of the victim, but the taped conversations, that Conte and Granello pled guilty. Indeed, it is rare in this day to encounter a cruder attempt to extort $25,000 and 25% of a man's business than the evidence reflected by the proof in this trial.

The Writ Should Be Disallowed

There is no compelling reason for granting the writ because the Court of Appeals did not decide a Federal constitutional question heretofore undetermined by this Court.

Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

What really happened below is this: It was anticipated that the Supreme Court would extend the Fourth Amendment to non-trespass wiretap cases as it did on December 18, 1967, in *Katz* v. *United States*, — U. S. —, 88 S. Ct. 507, so the Court rehabilitated § 813-a of the Code in *Berger* terms with this view in mind.

Clearly, there is no Federal constitutional prohibition against the Court's reconstruction of § 813-a.

Secondly, there is nothing so far as we know which would outlaw this state court action in any prior decision of this Court and the petitioner cites no authority in his petition.

Petitioner's argument (pp. 21-23) that *Berger* rendered § 813-a void is incorrect (*Dombrowski* v. *Pifster*, 380 U. S. 479, p. 491). As a matter of fact, not even the lone dissenter below questioned the *power* of the Court of Appeals to rehabilitate the statute. Rather, the Chief Judge thought it "unwise if not mischievous", not that the Court was precluded by Federal constitutional law.

Defendant's "Reasons For Granting The Writ" (p. 14) are the widespread concern in the country "that presently exists as to the effect of scientific progress upon the privacy and dignity of the individual." This concern is not in itself adequate for jurisdictional purposes unless novel or incorrectly determined Fourth Amendment rights are involved.

There is also no merit to petitioner's second argument (p. 15) wherein he claims that "*one* of the grounds relied upon by the Court of Appeals in sustaining the wiretapping herein was that *Berger* dealt only with 'bugging' by trespassory intrusion upon 'private premises'."

It is most respectfully submitted that a careful reading of the majority opinion does not support the charge that the Court's determination rests even in part on the fact that a non-trespass eavesdrop was here involved.

Indeed, we believe that Judge Keating specifically rejected the idea for New York that "trespass" was an adequate standard to determine the presence or absence of a Fourth Amendment question where bugging or wiretapping was involved.

The decision of the Court to apply *Berger* prospectively is not a basis for review (pp. 15-21; 30-31) because the Court specifically applied *Berger* to this appeal.

Had the Court below refused to apply *Berger* to the current case then an arguable point might exist. It is clear though that where, as here, the Court has, in fact, applied *Berger* to the police action challenged, no issue of retroactivity is presented.

Also lacking in merit is the reference to the "return." The argument is "no return" was ever made by the Nassau authorities to anyone so a clear violation of the Fourth Amendment is revealed (pp. 19-20).

Nothing could be further from the truth. In the best way possible, a return was made to the defense counsel and the Judge prior to and during the trial.

Prior to the trial, a copy of the order, the affidavit, and in particular the sworn testimony of Assistant District Attorney Norman Levy, upon which the order was based, were turned over to the defense counsel. Concededly the Judge had his copy at all times.

Following study and deliberation, a *long pre-trial hearing* was held permitting the defense counsel a full and complete opportunity to be heard and the right to cross-examine.

Moreover, at the trial the defense counsel had a verbatim typewritten copy of both taped conversations before the tapes were offered as evidence.

It is undisputed, we think, that a "return" was made to both petitioner and the trial judge. It is respectfully sub-

mitted the return was reasonable. Further, it certainly did not prejudice the petitioner in any way and no prejudice has been suggested.

That a return might be made to others or at a different time is not of constitutional proportions (*cf. Katz* v. *United States, supra; Osborn* v. *United States,* 385 U. S. 323).

The petitioner completely misses the mark when he says his Fourteenth Amendment rights were denied him because the state incorrectly labeled the sum of his two conversations as a "confession" (pp. 32-39). Not so (*Escobedo* v. *Illinois,* 378 U. S. 478, pp. 482-483; *People* v. *Bretagana,* 298 N.Y. 323, p. 326; *People* v. *Giro,* 197 N.Y. 152; 3 Wigmore on Evidence § 821).

It is a fact that together the conversations constituted or added up to a direct acknowledgment of guilt by Kaiser that he participated criminally in the planning and preparation with the co-conspirators Dino Conte and Salvatore Granello, a/k/a Sally Burns, of the attempt to extort $25,000 from Irving Holzman for an underworld "family" and to cut themselves in for 25% of Holzman's business.

In sum, they constituted a direct acknowledgment of guilt which is the classic definition of a confession (*supra*).

The § 605 argument (pp. 21-29) is once again raised in support of the application, it being charged that the police action in this case constituted a misdemeanor under § 605 of the Federal Communications Act because there was a tap and a divulgence without the permission or consent of Dino Conte or the petitioner, Thomas Kaiser, who were parties to the telephone conversation. The violation is not of constitutional proportions so we do not believe the petition should be granted on that ground (*Schwartz* v. *Texas,* 365 U. S. 458; *Pugach* v. *Dollinger,* 365 U. S. 458).

It is unclear precisely why and in what way this Court should now conclude that where a valid legal search order

has been issued, the production of the seized evidence as proof at the state criminal trial violates any constitutional right of the petitioner whether or not there has been a technical violation of § 605 by some law enforcement officer.

Moreover, there is nothing in *Berger* (388 U. S. 41) or *Katz* (—, U. S. —, 88 S. Ct. 507) which would suggest that this Court is moving in the direction of outlawing wiretap evidence or eavesdrop evidence where the police action meets Fourth Amendment requirements.

As a matter of fact, it might be the type of a case where this Court could reconsider the wisdom of *Benanti* v. *United States*, 355 U. S. 96 and whether the rule should be continued.

It is pointless, we think, at this late date to argue that it was not the intention of Congress to outlaw ordered wiretaps by state law enforcement officers even though many are the writers who conclude thusly:

> "57 Colum. L. Rev. 1159, 1162 (1957); 6 Geo. Wash. L. Rev. 326, 329 (1938); 53 Harv. L. Rev. 863, 865 (1940); 26 Ill. BJ 376, 377 (1938); 34 Ill. L. Rev. 758 (1940); 51 J. Crim. L. C & PS 441, 442 n 14 (1960); 52 Mich. L. Rev. 430, 432 (1954); 15 N.Y.U. L. Rev. 279 (1938); 16 U. Fla. L. Rev. 120, 121 n 10 (1963); 24 Va. L. Rev. 451 (1938)."

The better argument, we believe, might be to ask this Court to reconsider the wisdom of its prior decisions in the light of today's problems and the current state of the law.

There is good reason to re-think the issue of § 605 particularly in the light of *Osborn*, *Berger* and *Katz*. We believe this is especially so in the case of *Katz* because in outlawing eavesdropping, *i.e.* bug or wiretap, trespass or no, without a Fourth Amendment search warrant or order, the implication is there that the interception of a telephonic conversation pursuant to a valid search order, good in terms of the Fourth Amendment, would be acceptable to the Court.

It is undisputed that the invasion of Katz' privacy is precisely the same whether the Federal Bureau of Investigation bugged the phone booth or recorded from an outside terminal. The threat or danger to society of the one is not substantially different from the evil of the other.

Certainly, Mr. Katz would not have felt any differently if the police authorities had tapped rather than bug.

The prejudice to him would be exactly the same for "one who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" (*Katz* v. *United States*, — U. S. —, 88 S. Ct. 507, p.).

Nevertheless, this Court has specifically concluded that the Federal Bureau of Investigation might have procured an order to bug because "the Fourth Amendment cannot be translated into a general constitutional right to privacy."

Did the Court mean in *Katz* the Federal Bureau of Investigation might procure an order to bug alone or in any non-trespass eavesdrop? If the latter, then it seems the § 605 argument has fallen.

Surely there is no need to continue the *Benanti* doctrine in view of the conclusion of the Court in *Katz* that the Fourth Amendment is now applicable to *all* eavesdropping, whether bugging or wiretapping, and with or without a trespass. There is more than adequate protection for society inherent in this decision.

Moreover, history teaches us that the *Benanti* rule found little favor nationwide (Orfield, Criminal Procedure under the Federal Rules, § 26:881).

The contradiction was further heightened by the Court's refusal to enjoin State Court's Criminal Prosecutions predicated upon wiretap evidence (*Stefanelli* v. *Minard*, 342 U. S. 117; *Pugach* v. *Dollinger*, 365 U. S. 458). The confusion engendered by the § 605 argument can be cleared up

without prejudice now that the Court has seen fit to apply the Fourth Amendment to all eavesdropping.

We believe the only question remaining is whether the search and seizure conducted in this case complied with Fourth Amendment standards.

The affidavit of Assistant District Attorney Norman J. Levy, as well as his sworn testimony, plus the order of the County Court Judge will be found in Appendix B.

It will be noted from an examination of the order that it was signed by Judge Spitzer on July 1, 1964. The conversations complained of were intercepted between 6 P.M., July 3, 1964, and 10:15 A.M., July 5, 1964.

The case was thereupon presented directly to a Nassau County Grand Jury resulting in the arrest of all three defendants on July 15, 1964, and the arraignment on the indictment on July 16, 1964.

It is clear that the facts revealed by this petition do not come within the spirit of the roving commission condemned by this Court in *Berger* (388 U. S. 41, pp. 59-60).

The *Berger* order provided for a sixty day search that was extended for sixty more days.

Although the form order in this case also provided for a sixty day eavesdrop, it is undisputed that the police action questioned all took place between Friday evening 6 P.M., July 3, 1964, and Monday morning 10:15 A.M., July 5, 1964.

The Court is reminded that the order was signed on July 1, 1964, and the entire case presented to a Grand Jury resulting in the arrest and the arraignment of the three conspirators by July 16, 1964. While it is uncertain how long an eavesdrop may run without falling below the minimum standards of the Fourth Amendment, it is respectfully submitted that a single weekend should not be repugnant to a fair interpretation of the Constitution.

Moreover, we believe the defects in the order and affidavit noted by this Court in *Berger* are not here present. First, there are no doubts or suspicions about what, if any crimes, were in progress (*Berger*, 388 U. S. 41, pp. 55-58). Both the order and the Levy testimony make it clear beyond cavil that the offenses of conspiracy to commit the crime of extortion, coercion and attempted extortion were then, in fact, actually in progress. The ordering Judge was aware that the crime was actually being committed at the very moment that the District Attorney appeared under oath before him.

Secondly, there was not the slightest doubt about the identity of what the prosecutor was searching for (*supra*, pp. 55-58).

Specifically, the Nassau County Authorities wanted to record Granello and Conte demanding $25,000 from Irving Holzman for the underworld "family" of Mike Miranda and Vito Genovese, as well as 25% of Irving Holzman's interest in all of his businesses. No conscious human being can read the testimony of Mr. Levy otherwise.

It is both clear and convincing that the prosecutor stated his belief that the crimes of conspiracy and extortion were actually in progress, and he particularized in his testimony to the satisfaction of the issuing Judge precisely and exactly the conversations of both Granello and Conte that he wanted to record.

Finally, this Court's insistence in *Berger* upon a showing of urgency or a time of crises which required immediate aid (*supra*, p. 60) was convincingly established in at least two respects.

1. The victim's wife had already been attacked and beaten in her home.

2. The daughter of the victim received an anonymous telephone call that said: "If your father doesn't cooperate we'll come to Sylvia Lane and kick your fucking pregnant belly in."

It is beyond question that Granello was telling Holzman the truth when Granello said that the people that he was with are "animals." This threat suggested to Judge Spitzer as I think it should to this Court that a proper showing of "exigent circumstances" (*supra*, p. 60) has been made as only the "wild animals" of a "family" can make them.

Speaking of Chief Judge Miller's order in *Osborn* v. *United States* (385 U. S. 322), this Court said (*supra*, p. 330):

> "There can hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment', as 'a pre-condition of lawful electronic surveillance.'"

The respondent respectfully submits there was a much "clearer example" than the *Osborn* situation and it is that of Judge Spitzer of the County Court of the County of Nassau who before acting, and surely with the Fourth Amendment in mind, demanded and received more evidence identifying the crime than either Chief Judge Miller or Judge Grey of the same Court in *Osborn*, and he demanded and received much more evidence identifying the particular conversations sought out than by either Chief Judge Miller or Judge Grey.

In sum, then, petitioner makes no case for relief.

Respectfully submitted,

WILLIAM CAHN
District Attorney Nassau County
Attorney for Respondent
County Court House
Mineola, New York

HENRY P. DEVINE,
Assistant District Attorney,
of Counsel.

APPENDIX A

STATE OF NEW YORK

COURT OF APPEALS

2. No. 470. 67.

THE PEOPLE &c.,

Respondent,

against

THOMAS R. KAISER,

Appellant.

KEATING, *J.*:

Irving Holtzman was an executive of several corporations engaged in the distribution and operation of coin operated equipment whose enterprises reached into four of the five boroughs of New York City as well as Nassau and Suffolk Counties. In recent years Mr. Holtzman's business ventures grew and prospered to such an extent that the self-appointed "family" of sharers in the prosperity of honest businessmen determined that the time had come for Mr. Holtzman to share his wealth—"to give up a piece" of his business.

Sometime during the early part of June, 1964 a concerted effort was commenced to extort $25,000 from Mr. Holtzman as well as a 25% share of his business interests. As the arrangement was explained to Mr. Holtzman, "If at the end of (a) week you have $1 left, [we] take 25 cents and you keep 75 cents."

Mr. Holtzman, unmoved by the "family's" generosity and shaken by an assault on his wife by certain members of the "family", described to him as "animals", contacted the Nassau County police.

Appendix A

During the month of June the police, with the consent of Mr. Holtzman, through the use of wiretaps and bugs, recorded numerous conversations of Mr. Holtzman and one Salvatore Granello, known to his "family" and "animals" as Sally Burns. These recordings clearly established the existence of an extortion conspiracy on the part of Granello, Dino Conte and others.

As Mr. Holtzman's adamance persisted through June, the "family" apparently became more anxious. On the morning of June 30, 1964 Mr. Holtzman's daughter, Mrs. Ronald Billings, then pregnant and residing in Plainview, received a call which, from its contents, could only have been made by one of the "animals." Mrs. Billings was advised that "if your father doesn't cooperate we'll come to Sylvia Lane (Plainview) and kick your fucking pregnant belly in."

With this threat to the family of Mr. Holtzman, the District Attorney's office determined that it could best protect Mr. Holtzman and his family and determine precisely who was responsible for the threats by recording the telephonic communications made by Salvatore Granello and Dino Conte from several bars which they frequented and from which they had previously communicated with Mr. Holtzman.

In a petition and affidavit filed pursuant to the Code of Criminal Procedure, § 813-a, an assistant district attorney of Nassau County asked for a court order to make the necessary wiretaps.

In testimony made under oath the assistant district attorney related, with particularity and detail, the events which had transpired up to that point and which have been briefly narrated above.

At the close of this testimony the following colloquy took place:

The Court: At the present time have you been able to get any clue which would lead you definitely to the caller [who threatened Mrs. Billings]?

Mr. Levy: We have not, your Honor.

The Court: You feel as though this tap will assist you in that quest?

Mr. Levy: Yes, your Honor.

The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of croime may be obtained by intercepting messages over this telephone?

Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holtzman, in regard to the demand for $25,000 and 25 percent of his business.

The Court: So that in addition to the alleged extortion you feel faced here with the threats of violence and physical harm to innocent people?

Mr. Levy: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holtzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billings.

The Court: I am satisfied that there is reasonable ground for granting your application.

The order issued by Justice Spitzer in compliance with the provisions of section 813a recited the particular telephone numbers involved as well as their locations and went on to order

"that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section

813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing over the telephone located at *255 West 43rd Street, New York County, New York,* now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated and further . . ."

The order was to be effective from July 1, 1964 until August 29, 1964.

On the evening of July 3 and morning of July 5 during the course of the tap made on the telephone located at the Headline Bar, there were recorded conversations between Dino Conte and the defendant-appellant in this action, Thomas Kaiser. The conversations clearly and beyond any reasonable doubt implicated the defendant as a co-conspirator who had supplied Granello with detailed information regarding the operation of Mr. Holtzman's business enterprises. In addition, both conversations involved discussions of what should be done in light of Mr. Holtzman's intransigence. The defendant to his credit appears to have been against terrorizing him.

On July 15, 1964 Granello, Conte and Kaiser were arrested, and on July 16, 1964 Kaiser was arraigned on an indictment charging him with Coercion, Attempted Ex-

tortion, Conspiracy to Commit Extortion, Assault Second Degree and Burglary Second Degree. The defendant was convicted, after a trial by jury, of all but the latter two crimes. At the trial and over the objection of defense counsel the transcripts of wiretap recordings made on July 3 and 5 were admitted into evidence.

Alleging, among other things, that the admission of this evidence was reversible error, the defendant appealed to the Appellate Division (Second Department). The court unanimously affirmed his conviction. The defendant appeals to this court by permission of the Chief Judge.

The defendant argues on this appeal that, since the Supreme Court in *Berger* v. *New York*, 388 U. S. 41 (1967), struck down as unconstitutional on its face the very statute which authorized the wiretap order, the evidence seized pursuant to that order was erroneously admitted. The defendant urges, in addition, that all wiretap evidence should be held to be inadmissible because the seizure and divulgence of the evidence constitutes a violation of section 605 of the Federal Communications Act.

In *Berger* v. *New York*, *supra*, a case which involved the admissibility of evidence obtained by the use of a bugging device, the Supreme Court struck down Code of Criminal Procedure § 813a. The statute reads as follows:

> "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained,

and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The Supreme Court, after examining the statute, concluded that it was "too broad in its sweep, resulting in a trespassory intrusion into a constitutionally protected area and is therefore violative of the Fourth and Fourteenth Amendments" (387 U. S. 44). Specifically the Court found the statute "defective on its face" for several reasons:

Appendix A

"Eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the property sought, the conversations, be particularly described. The purpose of the probable cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to seize any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. Moreover, the statute permits, as was done here, extensions of the original two-month period—presumedly for two months each—on a mere showing that such extension is 'in the public interest.' Apparently the original grounds on which the eavesdrop order was

initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures'' (388 U. S. 58-60).

Whatever the effect of the decision on bugging cases and future bugging orders in this state, it should be noted that nowhere in the opinion in *Berger* does the court hold that wiretapping comes within the purview of the Fourth Amendment. While we shall accept for the present the appellant's assertion that *Berger* brought wiretapping within the purview of the Fourth Amendment and while we hold that the conditions set forth in *Berger* should, as a matter of policy, apply to future wiretapping orders issued under the statute, we believe that a reversal of the

appellant's conviction is neither mandated by *Berger* nor by the prophylactic purpose of the exclusionary rule to which wiretap evidence obtained in violation of the Fourth Amendment is now subject.

At the time the wiretap order in the case at bar was issued, there were no federal constitutional restraints on the securing of wiretap evidence. The Supreme Court had steadfastly adhered to its decision in *Olmstead* v. *United States*, 277 U. S. 436, that wiretapping, accomplished without a trespass into a person's home or other premises, does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Indeed, to this day *Olmstead* has not been squarely repudiated by the Supreme Court.

The Constitution and the laws of this state, however, place severe restraints on the right of public officials to obtain evidence by wiretapping. In 1938 the people of this state ratified Article I, § 12 of the State Constitution. That amendment provides:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

Section 813a of the Code of Criminal Procedure quoted earlier and section 738 of the Penal Law supplemented the provisions of the Constitution and extended them to all eavesdropping evidence obtained by "instrument" with-

out the consent of one of the parties to the conversation.

In *People* v. *McCall*, 17 N Y 2d 152, we held that the expressions "oath or affirmation" and "reasonable grounds to believe" contained in the statute "could have no other meaning" than to require the same factual basis to be shown for the issuance of the eavesdropping order "as in the case of search warrants" (17 N Y 2d 159). And relying upon cases in which we held affidavits to be insufficient in ordinary search warrant cases, we held that the wiretap evidence should have been excluded.

Subsequently in *People* v. *McDonnell*, 18 N Y 2d 509, we applied the same constitutional standards governing ordinary searches in holding that a defendant—not a party to the conversation—had standing to challenge the factual basis upon which the wiretap order was issued. And in *Matter of Sarisohn* (decided herewith) we again strictly adhere to the standards set down in cases involving ordinary searches and seizures.

It is thus "clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' [was] made a precondition of electronic surveillance" (*Lopez* v. *United States*, 373 U. S. 427, 464 [dissenting opinion of Brennan, *J.*]) and that no wiretap or bugging order could issue except upon an adequate factual showing, i.e., probable cause to believe that a crime had been committed and that the conversations particularized in the order would be seized.

With this requirement as with all the requirements of the statute the order in question complied. The most cursory examination of the testimony of the assistant district attorney made under oath before the judge who issued the warrant clearly indicates that there was probable cause to believe that a crime was being committed and

that the conversations regarding threats to Mr. Holtzman and his family would be obtained.[1]

It is true that the order did not adequately specify the precise conversation the police were authorized to seize —although the testimony of the district attorney under oath, which becomes part of the order, did (Code of Criminal Procedure § 813a); that the order was not sufficiently limited in time—although the actual conversations seized came within a limited period of three days; that no exigent circumstances were alleged for dispensing with the notice requirement—although, under Supreme Court decisions defining "exigent circumstances", those circumstances were present here (*Ker* v. *California*, 374 U. S. 25, 37-40); and that there was no return on the warrant—although we presume a return was made.

The reason for these defects is obvious—there has been no previous decision outlining the necessity for those requirements which *Berger* found to be mandatory. Under these circumstances, a reversal of the conviction would not be warranted either under the decisions of this court or the Supreme Court (*People* v. *McQueen*, 18 N Y 2d 337; *People* v. *DeRennzio*, 19 N Y 2d 45; *People* v. *Rensing*, —— N Y 2d —— (decided November 30, 1967); *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293).

In *Stovall* v. *Denno*, 388 U. S. 297, the Supreme Court set out the governing considerations in determining whether a fundamental change in constitutional interpretation should be applied retroactively:

"The criteria guiding resolution of the question implicate (a) the purpose to be served by the

[1] The conversations which were seized related in part to what was going to be done by the conspirators in light of Mr. Holtzman's refusal to capitulate to the lawless and disgraceful conduct of the defendant and his co-conspirators.

> new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. '(T)he retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.' "

The standards outlined in *Stovall* are identical to the standards we have adopted in recent cases. In *People* v. *McQueen, supra,* we considered the effect that a retroactive application of the standards outlined in *Miranda* v. *Arizona,* 384 U. S. 436, would have on the administration of justice in our courts as well as the fact that the evidence which would be excluded under the *Miranda* rulings in no way affected the "'integrity of the fact finding process'' (*Linkletter* v. *Walker,* 381 U. S. 861). In so doing we overruled explicitly the case of *People* v. *Loria,* 10 N Y 2d 368, which had given retroactive effect to the exclusionary rule enunciated in *Mapp* v. *Ohio,* 367 U. S. 643, as to those cases still on direct appeal. The basis of the ruling was the existence of a so-called "general rule" which required that this court apply the law as it exists at the time of our decision. A careful examination of the cases cited in *Loria* reveal that there was no such general rule and that the same considerations we adopt here, in fact, governed all those cases in which retroactive effect had been given. (See *Knapp* v. *Fasenbender,* 1 N Y 2d 212; *Matter of Tartaglia* v. *McLaughlan,* 297 N. Y. 419; *Robinson* v. *Robin Dry Dock & Repair Co.,* 238 N. Y. 271; *Black River Regulating District* v. *Adirondack League Club,* 307 N. Y. 475; *Harris* v. *Jex,* 55 N Y 421).

Applying these standards in the case at bar, we are led to the conclusion that the *Berger* decision should be given only prospective effect. The purpose of the exclusionary rule, to which *Berger* made eavesdropping evidence subject, is deterrence of future police conduct. Applying *Berger* retroactively will not, therefore, undo the violation of the defendant's rights which may have already taken place. The admission of the wiretap evidence has no effect on the "integrity of the fact finding process" (*Linkletter* v. *Walker, supra*). Indeed, the probative value of the evidence is beyond question. In addition, thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan,* 11 N Y 2d 350 cert. den. 371 U. S. 877; *People* v. *Cohen,* 18 N Y 2d 650 cert. den. 385 U. S. 976, rehearing den. 385 U. S. 1032). Moreover, even under prior law no eavesdropping order could be sustained without "the procedure of antecedent justification before a magistrate", which is central to the Fourth Amendment. Under these circumstances we hold that *Berger* should be held applicable only to those cases in which the orders were issued after the date of that decision.

The argument is advanced, however, that, since the statute was struck down as unconstitutional on its face, an order issued pursuant to it cannot be upheld. This argument is similar to that which has been rejected in all the recent decisions on retroactivity. The argument is that, if we hold that particular police conduct is now violative of an individual's constitutional rights, how can we say that the same conduct in the past did not likewise offend against his rights? Similarly if the offensive police conduct was authorized by a statute which is now found to be unconstitutional, how can we say that past conduct authorized thereunder was not equally violative of the defendant's rights?[2] The answer to both these questions is that logic

must sometimes give way to "reasons of practicality and necessity" (*People ex. rel. Keitt* v. *McMann*, 18 N Y 2d 257, 262). As this court observed in *People* v. *McQueen*, *supra*, "The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past."

Our discussion heretofore has assumed that *Berger*, in fact, brought wiretapping within the purview of the Fourth Amendment. A majority of the court, however, believes that, given the importance of the issue, the Court's failure to state clearly that wiretapping as well as bugging constitutes a violation of the Fourth Amendment and to overrule *Olmstead* v. *United States*, *supra*, expressly, is something more than a mere accident.

Unlike the bugging involved in *Berger*, wiretapping constitutes a violation of the Federal Communications Act. As a result, evidence obtained in violation of that statute has been held inadmissible in federal proceedings, irrespective of any possible Fourth Amendment violation (*Nardone* v. *United States*, 302 U. S. 379, 308 U.S. 338; *Benanti* v. *United States*, 355 U. S. 76). The Supreme Court has, however, refused to hold that the state courts are compelled to exclude such evidence (*Schwartz* v. *Texas*, 344 U. S. 199; *Pugach* v. *Dollinger*, 365 U. S. 458; *Benanti* v. *United States*, 355 U. S. 96). And, since the Court has continually adhered to its decision in *Olmstead* v. *United States*, *supra*, that the Fourth Amendment does not prohibit telephonic interception of messages accomplished without entry upon the caller's premises, the states have been free to permit the use of wiretap evidence in criminal proceedings.

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[2] There is language in our recent holding in *People* v. *Grossman*, 20 N Y 2d 346, which supports this reasoning. The retroactivity question was not argued in *Grossman* and we did not have an opportunity to reflect upon the most recent decision of the Supreme Court, *Stovall* v. *Denno*, *supra*. Any language in *Grossman* which is inconsistent with this opinion is expressly overruled.

Nevertheless, at least two of the Justices who made up the majority in *Berger* are on record as favoring rejection of past Supreme Court decisions and excluding all wiretap evidence in state proceedings (*Pugach* v. *Dollinger, supra* [dissenting opinion]).[3] A decision in *Berger* applying the Fourth Amendment protections to wiretapping would, however, have implied that evidence obtained through wiretaps would be admissible in state proceedings if the evidence was obtained in compliance with the provisions of the Fourth Amendment.

The *Berger* majority was apparently unable to resolve this problem.

Rather than become embroiled over collateral issues which were unnecessary to the decision in *Berger* and rather than formulate, contrary to "sound decision making principles," a constitutional holding which would amount to no more than dictum in any event (see *Stovall* v. *Denno*, 388 U. S. 293, 301), the court apparently determined to leave the resolution of the wiretap question to another case.

This analysis of *Berger* is, we believe, supported by a careful reading of the opinion of Mr. Justice Clark for the majority. The discussion of the *Olmstead* case is particularly instructive. To quote from the opinion:

> "The Court was faced with its first wiretap case in 1928, *Olmstead* v. *United States*, 277 U. S. 438. There the interception of Olmstead's telephone line

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[3] *Pugach* v. *Dollinger, supra*, the last case in which the Supreme Court spoke to the issue and upheld the admissibility of wiretap evidence in a state proceeding, the Chief Justice and Mr. Justice Douglas dissented and argued that all evidence obtained in violation of federal law should be excluded and that *Schwartz* v. *Texas, supra*, holding to the contrary, should be overruled. Mr. Justice Brennan concurred with the majority in *Pugach* but on grounds unrelated to the wiretap question. Mr. Justice Clark was with the majority in *Pugach* as well as *Schwartz*. These four judges along with Mr. Justice Fortas made up the five man majority in *Berger*.

> was accomplished without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. *The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house.* Statements in the opinion that 'a conversation passing over a telephone wire' cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' have been negated by our subsequent cases as hereinafter noted. *They found 'conversation' was within the Fourth Amendment's protections,* and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold.'' (388 U. S. 50-51). (Emphasis added.)

While Mr. Justice Clark indicates that that portion of *Olmstead* which held that speech was not capable of seizure has been ''negated'' by subsequent cases, nowhere does his opinion state that the basis of the decision in *Olmstead* that wiretapping accomplished without an intrusion into the caller's premises infringes on no constitutional right—has been ''negated'' by any subsequent decision.

Indeed, as late as 1964 in *Clinton* v. *Virginia,* 377 U. S. 158, the Court adhered to the reasoning evolved in *Olmstead.* The Court reversed a conviction obtained by the use of eavesdropping evidence involving a trespassory intrusion into a constitutionally protected area (*Goldman* v. *United States,* 316 U. S. 129; *Silverman* v. *United States,* 365 U. S. 505). And lest anyone think that *Olmstead* was overruled, since the court wrote no formal opinion, Mr. Justice Clark wrote:

> ''Since the Court finds that the 'spiked' mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment.'' (377 U. S. 158).

The Court's apparent intention, to stick to a distinction which can survive only as long as *Olmstead* remains viable,

is evidenced in the closing paragraph of the *Berger* opinion. In attempting to allay fears that the *Berger* opinion would have the effect of outlawing all eavesdropping orders, Mr. Justice Clark cited *Goldman* v. *United States, supra,* as an apparent instance of eavesdropping which would remain unaffected. *Goldman,* involving an eavesdrop accomplished without a physical trespass, relied solely upon the reasoning in *Olmstead* and strongly reaffirmed that decision.

While there is language in *Berger* indicating that wiretapping may be held to be within the provisions of the Fourth Amendment this language hardly approaches the level of dictum and, since on the same day the Supreme Court decided *Berger* it enunciated the rule that "sound principles of decision making (require) . . . that constitutional adjudications not stand as mere dictum", (*Stovall* v. *Denno,* 388 U. S. 301), we conclude that *Berger* did not affect the wiretapping provisions of Code of Criminal Procedure § 813a and that its decision affected only that "language (which) permits a trespassory invasion of the home, by general warrant, contrary to the Fourth Amendment" (*Berger* v. *New York, supra,* p. 64) and that the defendant's constitutional rights were not violated.

There remains for our consideration the second argument advanced by the defendant that the evidence should have been excluded because it was obtained in violation of Federal Communications Act § 605. The Supreme Court has held, in the exercise of its supervisory powers over the federal courts, that wiretap evidence is inadmissible in federal prosecutions. The court has, however, held that the states are not required to exclude such evidence (*Benanti* v. *United States,* 355 U. S. 96, 101). The basis of this decision was outlined by the Chief Justice as follows:

> "[D]ue regard to federal state relations precludes the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."

This statement, we believe, constitutes a complete answer to the argument advanced by the defendant that the wiretap evidence should be excluded in this state proceeding because its admission violates the federal statute. If Congress did not intend to thwart a state rule of evidence, we see no compelling reason to exclude the use of wiretap evidence.

The defendant argues, however, that the very interception of the telephonic communication violates federal law and that

> "At this time when the people of this state and country are being called upon to reaffirm their allegiance to the rule of law, it is a complete farce for the courts, prosecutors and police of this state to sanction such criminal behavior."

This argument is not without merit. If the issue were as simple as he suggests, a reversal would surely be mandated. Do we not, however, sanction criminal conduct and promote disrespect for law when we allow a man who is clearly guilty, who is convicted on the basis of evidence obtained in conformity with the strictest standards of the Constitution, to go free and menace the security of law abiding citizens? This is not to say that the ends justify the means and that proof of guilt sanctions violations of constitutional rights. But when the sole justification for the exclusion of evidence is that its admission will sanction criminal conduct and promote disrespect for law, we are obligated to consider whether the more desirable result will flow from excluding the evidence.

Moreover, we are dealing here with the violation of a statute which for its charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against state officials who violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; State-

ment of Attorney General William P. Rogers, New York Times, December 24, 1957, p. 10 c. 1.) If the statute is viable let it be enforced. If the statute is flouted, let the offender be prosecuted. Because the constitutional provisions carried no penal sanctions to discourage violation exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions.

In light of what can only be deemed a policy of nullification by federal officials, a state court, we believe, is justified in qestioning whether it should indirectly enforce a federal statute which the Executive has consistently refused to enforce—a refusal the Congress has impliedly sanctioned. As the Supreme Court once observed: "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is written on the statute books, and to disregard the gloss which life has written upon it." (*Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362). " 'Deeply embedded traditional ways of carrying out state policy. . . .'—or not carrying it out— 'are often tougher and truer law than the dead words of the written text.' " (*Poe* v. *Ullman*, 367 U.S. 497, 502).

Under these circumstances we decline to hold that wiretap evidence obtained in substantial compliance with the strictest provisions of the Constitution of the United States and of this state must be excluded in criminal prosecutions in this state.

We have thus far been concerned with eavesdropping pre-*Berger* v. *New York, supra.* In light of recent lower court decisions (See e.g., In re *Intercepting Telephone Communications*, ———Misc 2d ———, New York Law Journal, November 8, 1967 p. 22 c. 1) we feel it would be desirable to set forth what we believe to be the proper procedure as a result of the *Berger* decision. (See e.g., *People* v. *Huntley*, 15 N Y 2d 72).

We hold, in conformity with the traditional policy of this court to construe statutes in such a manner as to

uphold their constitutionality (*People* v. *Epton*, 19 N Y 2d 496; *People* v. *Finkelstein*, 9 N Y 2d 342; *Matter of Coates*, 9 N Y 2d 242; *People ex rel. Morriale* v. *Branham*, 291 N. Y. 312; McKinney's Cons. Laws of New York, Book 1, Statutes § 150, p. 237, n. 97, and cases cited therein) [4], and in conformity with our specific policy of construing section 813a so as to provide the same protections afforded by the Fourth Amendment, that, in addition to a showing of probable cause, an order issued under the statute must particularize to the extent possible the exact nature of the conversations sought, that it must provide for a return, that it must be severely limited in time, as outlined in *Berger*, and that it must provide for termination as soon as the conversations are seized. In addition, it should allege that exigent circumstances exist, viz. that the "destruction" of the object of the "search" will result unless the notice requirement is waived.

This rehabilitaion of the statute is possible even though the Supreme Court struck the statute down on its face. In *Dombrowski* v. *Pfister*, 380 U.S. 479, the Supreme Court enjoined the enforcement of a state statute on the ground that it was unconstitutional on its face. The action was taken at the behest of petitioners, who, like *Berger*, were found to have been "affected" by the statute, although not necessarily directly deprived of any rights thereunder.

The language of the court, in indicating taht the statute could be rehabilitated, is applicable here:

> "The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the

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[4] As Chief Judge Fuld recently wrote, this court "when faced with the choice of declaring a statute unconstitutional . . . or interpreting the legislation in such a way as to supply a missing constitutional safeguard . . . [has never] hesitated 'to embrace [the course] which will preserve [the statute's] validity'" (*Bell* v. *Waterfront Commission of New York Harbor*, 20 N Y 2d 54,61).

burden of obtaining a permissible narrow construction in a non-criminal proceeding before it may seek modification of the injunction to permit future prosecutions." (380 U. S. 491)

In the case at bar no such special proceeding to obtain a limiting construction of the statute is necessary, as we do not deal with a criminal statute.

We conclude by noting that, as a result of our construction of the statute the people of this state are afforded greater protestion against *all* forms of electronic eavesdropping, including that which involves no trespass whatever, than even the decisions of the Supreme Court have provided. Yet much as we might like, we cannot ignore the realities of life. We cannot ignore the rise of organized criminal activity and "families" who promise to provide the true "big brothers" of 1984. As the facts in this case reveal, some intrusion under the most severely regulated and restricted conditions are necessary, lest the only security we enjoy is that from government intrusion. This was the conclusion of the President's Commission on Law Enforcement and Administration of Justice, 200-203 (1967) and it is our conclusion today.

We have examined the remaining arguments raised by the appellant and find that they do not warrant reversal (*People* v. *Kingston,* 8 N Y 2d 384).

The judgment appealed from should be affirmed.

Appendix A

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

THOMAS KAISER,
Defendant-Appellant.

FULD, *CH. J.* (dissenting):

The decision which the court is now making, I suggest, disregards both the holding and the spirit of *Berger* v. *New York* (388 U. S. 41). The eavesdropping statute—section 813-a of the Code of Criminal Procedure—held invalid in that case is the very same statute under which the ex parte wiretapping order in the case before us was granted. The Supreme Court there ruled that section 813-a was "deficient" and unconstitutional "on its face" as an impermissibly broad and sweeping intrusion into the constitutionally protected area of individual privacy (388 U. S., at pp. 44, 55). If this language has any meaning, it is that the statute is invalid in its entirety insofar as it authorizes eavesdropping, whether the particular form of such eavesdropping be "bugging" as in *Berger* or wiretapping as in the present case. Moreover, there cannot be any doubt that the dominant considerations on which the *Berger* decision was predicated are equally applicable to both of these types of surreptitious interception.

The Supreme Court found the statute to be constitutionally "offensive" in at least four respects. First, it

improperly authorized eavesdropping "without requiring belief that any particular offense has been or is being committed" and, in effect, gives "the officer a roving commission to 'seize' any and all conversations" akin to the old repudiated "general warrant". Second, the statute's "authorization of eavesdropping for a two-month period [was] the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause". Third, "the statute place[d] no termination date on the eavesdrop once the conversation sought is seized." And, fourth, the statute "ha[d] no requirement for notice as do conventional warrants" and did not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties" (pp. 59-60). "In short," the Supreme Court summed up the matter, "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures" (388 U. S., at p. 60).

Quite obviously, the defects which the court pointed to exist whether section 813-a be invoked as authorization for bugging or for wiretapping. In fact, the Supreme Court failed to make any distinction between bugging and wiretapping other than to observe that they were both forms of eavesdropping which developed at different times (388 U. S., at pp. 45-47). The court did, it is true, refer to its 1928 decision in *Olmstead* v. *United States* (277 U. S. 438) in which wiretapping, in and of itself, was held outside of the protective ambit of the Fourth Amendment. The court in *Berger*, however, expressly held that *Olmstead* was no longer sound law insofar as it differentiated between "conversation" and tangible property. The court thus noted that statements in the *Olmstead* opinion to that effect had been "negated" by later decisions which held that "the use of electronic devices to capture * * * ['conversation'] was 'search' within the meaning of the Amendment" (p. 51).

Appendix A

Although the court in *Berger* did not, in so many words, overrule the other basis for the *Olmstead* decision—that wiretapping did not per se entail a physical invasion of private premises—it is evident from a reading of the *Berger* opinion that that aspect, too, has little or no remaining force. The thrust of the *Berger* opinion, indeed its underlying theme, was that eavesdropping, the generic term encompassing wiretapping and bugging, is within the ban of the Fourth Amendment not because it may constitute a trespass in the technical sense but because "[b]y its very nature * * * [it] involves an intrusion on privacy" of unduly broad scope (388 U. S., at p. 56). "Few threats to liberty exist," the court declared (p. 65), "which are greater than that posed by the use of eavesdropping devices." In this regard, it is significant that both Justice Douglas, in concurring (p. 64), and Justice Black, in dissenting (p. 80), regarded the *Berger* decision as necessarily overruling *Olmstead* and that Justice White, in his dissent (p. 113), viewed the issues presented as not turning on whether it was bugging or wiretapping which happened to be involved.

Once it be determined that section 813-a of the Code is unconstitutional in its entirety, the impact of *Berger* may not properly be avoided by holding that it is not to be applied to cases (such as this) which come to our court in the normal course of the appellate process, even though the trials antedated that decision. I can add little to what Judge Christ has so ably stated on the subject in his dissent (Mimeographed Opinion, pp. 4-5) in *People* v. *Morhouse* (20 N Y 2d ——, also decided today). In Berger, the Supreme Court held that evidence obtained pursuant to section 813-a was the product of an illegal search and seizure in violation of the Fourth Amendment, and we have consistently held, with respect to such evidence, that the exclusion-

ary rule announced in *Mapp* v. *Ohio* (367 U. S. 643) should be applied "in our review of pending appeals," even though the trials took place before *Mapp* and were conducted in the light of the law as it then existed. (*People* v. *O'Neill*, 11 N Y 2d 148, 152; see, also, *People* v. *Loria*, 10 N Y 2d 368, 371; *People* v. *Muller*, 11 N Y 2d 154.) In *People* v. *McQueen* (18 N Y 2d 337), it is true, the court declined to give retrospective application to the new rules enunciated in *Miranda* v. *Arizona* (384 U. S. 436) concerning the use of confessions obtained by police interrogation but we neither held nor intimated that our prior practice in search and seizure cases should be modified. In point of fact, just a few months ago—and of course, after *McQueen* (18 N Y 2d 337, *supra*)—our court in *People* v. *Grossman* (20 N Y 2d 344), involving the very statute now before us, wrote that, since *Berger* had held section 813-a unconstitutional, "it is as if there had never been any valid authority for the police to act as they did" (p. 349).[1] To change the practice to the prejudice of the defendants now before us (Kaiser and Morhouse) is highly unfair, if not unconstitutional smacking as it does of unequal protection of the laws.

Although there may be some situations in which prospective application of a new rule may be dictated by the fact that the police placed "reliance" on old rules or prior decisions, the present is not such a situation. The Supreme Court, it is true, had not previously ruled that evidence obtained by means of wiretapping could not be used in a state court. But it had, repeatedly and for many years, held that the tapping of telephone wires and the disclosure of the contents of the communications intercepted consti-

[1] The majority avoids this pronouncement by blandly declaring (Mimeographed Opinion, p. 13, n. 2) that "[a]ny language in *Grossman* * * * inconsistent with this opinion is expressly overruled"!

tute a crime under section 605 of the Federal Communications Act. (See, e.g., *Benanti* v. *United States*, 355 U. S. 100.) Manifestly, in such a situation, the prosecution should not be permitted to make the criminal conduct of its agents a basis for a claim of "reliance" on the prior state of the law.

As the majority here acknowledges, the order permitting the wiretap in the present case contained many "defects" (Mimeographed Opinion, p. 10) of the kind which the Supreme Court in *Berger* held to be violative of essential constitutional safeguards. Thus, the order broadly authorized the interception and recording of "*all telephone communications made by* and to Salvatore Granello, Dino Conte *and any and all other persons* communicating by both incoming and outgoing calls over the telephone located at 255 W. 43rd Street, New York County, New York * * * [*from July 1*] *until the 29th day of August, 1965.*"[2] As is manifest—and I cull from the opinion in *Berger* (388 U. S., at p. 59)—the effect was to give the officer "a roving commission", on the order of a general warrant, "to 'seize' any and all conversations" (p. 59). Moreover, the order, as indicated, was to be effective for two months, a length of time expressly condemned by the Supreme Court in *Berger;* as the court pointed out, "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. * * * During such a long and continuous (24 hours a day) period the conversations of any and

[2] The order further provided that the Nassau County District Attorney or his agents were "authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instrument that the said District Attorney * * * [and a named assistant district attorney] or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire."

all persons * * * will be seized indiscriminately and without regard to their connection with the crime under investigation" (p. 59). And, since its success necessarily depends on secrecy, the procedure authorized by the order has—and I again quote from the *Berger* opinion (p. 60)—"no requirement for notice as do conventional warrants" and does not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties."

The majority has attempted to overcome the objections voiced in *Berger* by a suggested retrospective interpretation of section 813-a to narrow the unconstitutionally broad reach of that statute. As support for this suggested "rehabilitation" of the section, the majority points to *Dombrowski* v. *Pfister* (380 U.S. 479), where it was held that a criminal statute, concededly unconstitutional on its face, could not be enforced "until an acceptable limiting construction is obtained" (p. 497). I cannot agree that the majority's suggested interpretation is "an acceptable limiting construction". It has done nothing more than to outline, in general terms, the limitations which it proposes to read into the statute. The implementation of the suggestion is apparently to be left to future judicial decision. The Supreme Court in *Berger* made it plain that it would not uphold any legislation authorizing eavesdropping which did not embody " 'precise and discriminate' requirements" sufficient to comply with the strict demands of the Fourth Amendment (388 U.S., at p. 58). The limitations here proposed are entirely too vague and indefinite to satisfy that criterion. Actually, the proposed "rehabilitation" would consist not merely of grafting "a missing constitutional safeguard" on to the statute, as was the situation in *Matter of Bell* v. *Waterfront Comm.* (20 N Y 2d 54, 62; see, also, *People* v. *Epton*, 19 N Y 2d 486), but of completely rewriting the statutory language and adding, under the

guise of construction, matters of detail which, of necessity, must be left to the Legislature.

In this connection, I must say that I do not understand how this court may legitimately fashion a "procedure for wiretapping and for the issuance of orders permitting such wiretapping. The Legislature has outlawed all wiretapping except that authorized by section 813-a (see Penal Law, § 205.00, subd. 3; § 205.05 [formerly §§ 738, 739]) and has expressly provided in CPLR 4506 that evidence obtained by wiretapping (or other eavesdropping) without a court order issued pursuant to that statute, "shall be inadmissible for any purpose in any civil or criminal action". Beyond that, since the revisers of our Code of Criminal Procedure have already drafted and proposed an article (art. 370), to replace section 813-a, which "precisely set[s] forth the forms and procedures to be followed at each phase of eavesdropping, from application, through termination, to judicial record-keeping" and contains "a number of restrictions in the utilization of eavesdropping not previously found in New York law nor specifically called for in the *Berger* decision,"[3] it seems to me unwise, if not mischievous, for a court to undertake to assume what is a strictly legislative function.

Further, and quite apart from the combined impact of the *Berger* decision and CPLR 4506, I am more than ever confirmed in the view I expressed in dissent in *People* v. *Dinan* (11 N Y 2d 350, 356) that all evidence obtained

[3] See Proposed New York Criminal Procedure Law [Temporary Commission on Revision of the Penal Law and Criminal Code], art. 370, p. 401. The Staff Comment recites that "this article provides a comprehensive scheme for the restricted issuance of eavesdropping warrants, based upon strict standards of probable cause and necessity, and demanding scrupulous particularity in the description both of the person and place upon which the eavesdropping is to be conducted and the nature of the evidence sought thereby."

through wiretapping should be excluded on the ground that its very introduction in open court constitutes a Federal crime in violation of section 605 of the Federal Communications Act. (See, also, *People* v. *McCall*, 17 N Y 2d 152, 150, concurring opinion; *People* v. *Cohen*, 18 N Y 2d 650, 651, dissenting opinion.)

In sum, then, since section 813-a has been invalidated and stricken in its entirety, no authorization existed for the ex parte order permitting wiretapping in this case. Consequently, CPLR 4506 requires the exclusion from evidence of the conversations intercepted by means of such wiretapping.

The judgment appealed from should be reversed and a new trial ordered.

* * *

Judgment affirmed. Opinion by KEATING, *J.* All concur except FULD, *Ch. J.*, who dissents and votes to reverse and order a new trial in an opinion.

APPENDIX B

Ex Parte Hearing Upon the Application for the Wire Tap Order

Petition of Norman J. Levy, Assistant District Attorney:

COUNTY COURT

NASSAU COUNTY

In the Matter of the Application of NORMAN J. LEVY*, an Assistant District Attorney of the County of Nassau

for

an Order for Interception of Certain Telephone Communications
212 LW 4-2523

The Petition of *Norman J. Levy* respectfully shows and alleges:

1. That your petitioner is over twenty-one years of age and resides at *120 Wynsum Avenue, Merrick,* Nassau County, New York, and that since *January 12, 1959* your petitioner has been and is an Assistant District Attorney of Nassau County.

2. That your petitioner is actively engaged in the investigation of crimes committed in violation of the Penal Law of the State of New York, and particularly in the

* This is a form affidavit, and the filled in blanks are designated by italics.

investigation of the crimes of *Attempted Extortion, Conspiracy to Commit the Crime of Extortion and Conspiracy to Commit a Crime which your petitioner* has good and sufficient reason to believe is being committed in Nassau County, New York.

3. That in connection with the aforesaid investigation, petitioner has been conducting an investigation of the criminal activities of *Salvatore Granello, Dino Conte* and John Doe and Richard Roe (said names of John Doe and Richard Roe are fictitious; their true names and identity being unknown to your petitioner) who, your petitioner is informed and believes, have been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as participants or as material witnesses, have knowledge or information regarding said crime and are in communication by telephone with other persons having such knowledge and information.

4. That *Headline Bar*, has a telephone at *255 West 43rd Street, New York County, New York*, the number of which is *212 LW 4-2523* and that your petitioner is informed and has reason to believe that the said telephone and the communications made over said telephone by the said *Salvatore Granello, Dino Conte* and other persons who use said telephone, are the means of carrying on and promoting criminal activities; and petitioner is informed and has reason to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument, such crimes being in violation of the Penal Law of the State of New York.

5. That no previous application has been made for the order herein applied for.

Appendix B

WHEREFORE, your petitioner prays that an order be made herein under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, authorizing and empowering the District Attorney of Nassau County and your petitioner as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County or of your petitioner as such Assistant District Attorney of Nassau County to intercept and record all telephone communications made by and to the said *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over said telephone located at *255 W. 43rd Street, New York County, New York,* now designated as *212 LW 4-2523* from the date of making of such order until, up, to, and including *the 29th day of August, 1964.*

NORMAN J. LEVY,
Petitioner.

Appendix B

STATE OF NEW YORK
COUNTY OF NASSAU } ss.:

NORMAN J. LEVY, being duly sworn, deposes and says:

That he is the petitioner named in and who signed the foregoing petition. That he has read the said petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true.

NORMAN J. LEVY.

Sworn to before me this
30th day of June, 1964.

NOTARY PUBLIC, STATE OF NEW YORK.
(Notary's signature and seal indistinguishable on copy.)

Appendix B

DISTRICT ATTORNEY'S INVESTIGATION

RB 2-27-64

212-LW-4-2523

In the Matter of the Application of NORMAN J. LEVY, an Assistant District Attorney of the County of Nassau,

for

an Order for Interception of Certain Telephone Communications

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County Court, New Courthouse,
Mineola, N. Y., July 1, 1964.

Before:

HON. HAROLD M. SPITZER,
County Court Judge.
(In Chambers)

Appearances:

NORMAN J. LEVY, Assistant District Attorney.

DONALD J. WHITE, CSR.,
DA Confidential Reporter.

Appendix B

NORMAN J. LEVY, being duly sworn by the Court, testified as follows:

By the Court:

Q. State your name and address. A. Norman J. Levy, 120 Winsum Avenue, Merrick, New York. I am an attorney duly licensed and admitted to practice law in the State of New York.

I am and have been an assistant district attorney of Nassau County since January 12, 1959, and I am Chief of the District Attorney's Rackets Bureau.

Since June 8, 1964, I have been conducting an investigation of the crimes of attempted extortion, conspiracy to commit the crime of extortion, conspiracy to commit a crime and felonious assault.

On June 8, 1964, I had a conversation wtih Irving Holzman who resides at 55 Sycamore Drive, Roslyn, New York. Mr. Holzman resides at 55 Sycamore Drive, Roslyn, with his wife, Mrs. Ruth Holzman.

Mr. Holzman's business is United East Coast Corporation which is located at 583 Tenth Avenue, New York 36, New York He also maintains a business in the County of Nassau and that busines is located at 243 Northern Boulevard, Great Neck.

The nature of Mr. Holzman's business is that he is a distributor of automatic coin machines, juke boxes, game machines, and he is the owner of routes of automatic coin machines locations, juke boxes, game machines and cigarette machines.

Mr. Holzman told me that a principal of one of his juke box routes is one Robert Luttman. Mr. Luttman is also employed by Mr. Holzman as an adjustor and his duties as an adjustor are to adjust problems that arise in connection with automatic coin machine locations that are owned by Mr. Holzman in connection with Mr. Luttman, himself and with others.

Appendix B

Mr. Holzman told me that he became aware that Luttman had gone to a location in the Bronx, the Calypso Lounge, in the end of May, 1964, to adjust a location on behalf of Mr. Holzman. At that location in the Bronx a competitor Jet Automatic, was seeking to take over a location belonging to Mr. Holzman wherein he had placed an automatic coin machine.

Mr. Luttman went to the Calypso Lounge and spoke with the owner of the premises, and the basis of Mr. Holzman's knowledge is a conversation he had subsequently with Mr. Luttman. This is in regard to the Calypso Lounge.

Mr. Holzman said that Luttman told him that in seeking to keep the location for Mr. Holzman that he, Luttman, had told the owner of the Calypso Lounge that one Sally Burns was with Mr. Holzman and Mr. Luttman in that location.

Mr. Holzman identified the name Sally Burns as an alias of one Salvatore Granello. Salvatore Granello resides at 215 Mott Street, Apartment A-1 in the Borough of Manhattan in New York City. Salvatore Granello is known through the Intelligence of the District Attorney's Rackets Bureau and Central Intelligence Bureau of the New York City Police Department to be a member of Cosa Nostra.

He is a member of the Thomas Luchesse, alias Three Finger Brown, Family of Cosa Nostra. He is presently under indictment by the federal government, Southern District of New York, and he's charged with income tax evasion.

He's out on bail pending the trial of his case. He has previously been arrested in Orange County for the crime of rape, and he is awaiting trial on that indictment in Orange County.

Appendix B

Mr. Holzman told me that he informed Mr. Luttman that he had had no right to use Sally Burns name in connection with that location or any other location.

Mr. Holzman said that on June 4, 1964, a Thursday, a man came to his New York office located at 583 Tenth Avenue, New York and identified himself as Dino Conte.

Mr. Holzman told me that he believed Conte was a relative of one of his upstate New York customers and as a result spoke with Conte in his office.

At this time Holzman said that Conte indicated that he had been sent by Sally Burns to talk to Holzman. Conte said to Mr. Holzman at that time, "Do you know Charles Morel? Do you know that Playmore is jumping Charles Morel's locations?"

Conte then said to Mr. Holzman, "We're not interested in Morel but the people Morel is with."

A previous investigation by the District Attorney's office has ascertained that Mr. Morel is a principal of Local Vending and that another principal of Local Vending and partner of Mr. Morel's is one Mike Miranda.

Through our intelligence information Michael Miranda has an arrest record. He's previously been arrested twice for homicide. Both of these charges were dismissed. He has a New York City Police Department B # 129648.

He resides at 167 Greenway North in Forest Hills. Mr. Miranda, according to sworn testimony by Joseph Valachi before the Senate Investigating Committee, is one of the National Commissioners of Cosa Nostra, and he's the advisor or consigilliare to Vito Genevese and the Vito Genovese family of Cosa Nostra.

This information, your Honor, is borne out by our own intelligence information and the fact that Mr. Miranda is a partner of Mr. Morel in Local Vending.

Appendix B

By the Court:

Q. Conte said something about Charles Morel jumping locations? A. No, your Honor. Conte said that Playmore was jumping Morel's locations and he said to Mr. Holzman, "We're not interested in Morel, but the people Morel is with."

Q. Who is Playmore? A. According to our investigation the principal of Playmore, which is also an automatic coin machine partnership or corporation, is one Harold Kaufman.

Conte at this time asked Mr. Holzman if Holzman was a partner with Playmore. Mr. Holzman informed Conte that he was not.

At this time Conte said to Mr. Holzman, "We know that you bought out your partner's estate and that you now own Long Island National," which is another juke box operation that Mr. Holzman owns.

He had been a partner in this jukebox operation until his partner, one David Simon, died and he had bought Simon's interest out from the estate.

At this point, according to Mr. Holzman, Conte said to him, "You used Sally's name. He doesn't mind, but people are saying you're Sally Burns' partner."

Mr. Holzman told me that he told Conte, "I never used Sally Burns' name; one of my employees did, and he told me he was authorized to use Sally Burns' name."

At this point Mr. Holzman said Conte said, "No one is authorized to use Sally Burns' name." Conte then said to Mr. Holzman that Burns wanted to have dinner with Holzman that evening.

Holzman told me that he then said to Conte, "You just come in off the street. You tell me you know Sally Burns. How do I know that you know Sally Burns?"

Holzman then started to walk to the telephone and he told Conte that he would call Sally Burns directly and

speak to him on the telephone. At that point Holzman said Conte said, "Don't do that." He, Conte, would have Sally Burns contact Holzman within the next hour.

Mr. Holzman said that approximately two hours passed and he then received a telephone call from Sally Burns at his office at 583 Tenth Avenue, New York. During the course of this conversation Burns invited Mr. Holzman to have dinner with him that evening and Mr. Holzman told me that he advised Burns that he would be unable to meet with him that evening.

They then discussed having lunch the next day, Friday, June 6, 1964. Burns asked Mr. Holzman to meet him for lunch at the Charles Restaurant on Sixth Avenue in Manhattan.

Mr. Holzman told me that he told Burns that he was too busy to meet Burns at the Charles Restaurant, but that Burns could come over to Mr. Holzman's office on Tenth Avenue and have lunch with him.

An appointment was made for the next day. Mr. Holzman said that on June 5, 1964, he was in his office at Tenth Avenue and that Burns did not come to his office for lunch, nor did he call him and inform him that he wasn't coming.

On Monday, June 8, 1964, Holzman told me he left for his Manhattan office at approximately 7:40 A.M. Approximately five minutes after he left for work his wife, Mrs. Ruth Holzman, stated that a man rang her doorbell and said that he was from United Parcel.

At this time she was upstairs in their home at 55 Sycamore Drive in Roslyn. She came downstairs to answer the door.

When she opened the front door the unknown man already had the storm door open and he shoved her backwards and she fell to the floor.

According to Mrs. Holzman she stated that the man put his left hand over her mouth and asked her, "Where is your husband?"

She started to scream and during the struggle the man, who had been wearing glasses lost his glasses. When they fell to the floor she grabbed the glasses and held them under her.

During the course of the struggle the man pulled a gun and when she started to scream a neighbor came to her assistance and three men who had been waiting outside the home informed the man who was inside the home that the neighbors were going to call the police, that the cops were coming. "Let's get out of here."

At this time the man who was in the house left the house and the men got into the automobile and left the scene.

Mr. Holzman said that when he arrived at his office—

Q. Excuse me for interrupting you. A. Yes, your Honor.

Q. Was this assault reported to the police? A. Yes, it was.

Q. And is it under investigation? A. It is under investigation at this time, your Honor.

Q. Has the neighbor referred to been interviewed? A. Yes, she has.

Q. And does she verify these facts? A. Yes, she does, your Honor. And that matter is under investigation jointly by the Sixth Squad of the Nassau County Police Department and the office of the District Attorney of Nassau County.

Mr. Holzman informed me that he arrived at work that morning at approximately ten a.m. Strike that.

Mr. Holzman informed me that when he arrived at his office he was told by a business associate to call home right away.

He called his home and was informed by his son-in-law, Ronnie Billing, what had happened to his wife and he was to come—he was told to come right away.

He drove to his home and after arriving there at approximately 12 p.m., one of his employees, one Lou Drutman, called him and advised him that Sally Burns had been at this office, Holzman's office in New York, and had said that he'd heard on the radio what had happened to Ruth.

Drutman told Holzman that Burns had left a phone number for Holzman to call Burns at. Drutman gave Holzman the telephone number, 212-LW-4-2523.

The subscriber of this telephone is the Headline Bar, Eighth Avenue and 43rd Street, New York City. The exact address of the Headline Bar is 253 West 43 Street, New York County.

At that time from his home Holzman called 212-LW-42523 and asked for Sally Burns. Burns spoke to him on the telephone and instructed Holzman to go to an outside phone and call Burns at 212-LW-4-2523, the same number.

Holzman told me that he went to a neighbor's telephone and again called Burns at the same number. Holzman said that he said to Burns over the telephone, "Did you hear what happened to my wife?"

Holzman said that Burns replied, "I know all about it." At this point Burns asked Holzman to come to New York to meet him at the Charles French Restaurant, 452 Sixth Avenue, Manhattan.

Holzman said that he advised Burns that he didn't want to leave his wife and he wanted to know why Burns wanted to see him.

Holzman said that Burns told him that he wanted to talk to him about what happened to Holzman's wife. Holzman said that he asked Burns to tell him over the telephone and Burns said, "Meet me. Don't talk about it on the telephone."

Holzman said that he and his son-in-law, Ronald Billing went to the Charles French Restaurant, 452 Sixth Avenue in New York and arrived there at approximately three p.m.

Holzman said that Burns asked his son-in-law to wait at the bar while he spoke to Holzman. Holzman said that

he and Burns sat at a table at the Charles Restaurant and Burns said to him, "It's around the industry that you're in the million dollar class, you're the biggest man in the industry.

No one gets in that class unless he has someone with him."

Holzman said that at this time he interrupted Burns and said, "I thought you were going to tell me about what had happened to my wife?"

He said that he asked Burns, "Did you hear about it on the radio" and that Burns replied, "No, I didn't hear about it on the radio; never mind how I heard about it."

At this point Burns said to Holzman, "If you had met me Friday I wouldn't have forgot to come to you and this wouldn't have happened. If I had come home Sunday from Greenwood Lake instead of Monday this wouldn't have happened.

"The people I'm with are animals. They couldn't wait until I came home."

Holzman said that Burns then stopped talking about his wife and said to Holzman, "Even Costello had to give up a piece."

"Now, with you the family wants $25,000 in cash and I want you to give it to to them."

Burns then said to him, "I would never mention the word, 'family' but with you I have no worries and I want 25 per cent of what you have—not what your partners have—just you."

Burns said to him, at the end of each week he and Burns would meet and have dinner and for every dollar Holzman took in he would keep 75 cents and 25 cents would go to Burns.

He told Holzman, "If at the end of the week you have $1 left I take 25 cents and you keep 75 cents."

At that time Burns asked Holzman for an answer and he told him that he couldn't give him an answer at that time, he'd have to think about it.

Burns then asked Holzman to meet him the next day, Tuesday, June 9, 1964, at the Charles Restaurant.

That evening, Monday, June 8, 1964, myself, District Attorney Cahn and Detective Shephard and Detective Costello were advised of the meeting between Burns and Holzman at the Charles Restaurant.

Holzman also stated that as he was leaving the meeting with Burns that had taken place at the Charles Restaurant he observed Dino Conte in the bar of the Charles Restaurant. He had no conversation with Conte at that time.

Holzman stated that the meeting to take place on Tuesday, June 9, 1964, at the Charles Restaurant with Salvatore Granello, alias Sally Burns, was set for 12 o'clock noon.

The next day at approximately 12 o'clock noon Holzman in my presence called the Charles Restaurant and spoke to Sally Burns. He asked Burns if he should go out to an outside telephone and call Burns back. Burns said that he wanted Holzman to do that.

Holzman then went to an outside telephone in the presence of myself, Assistant Chief Inspector James Farrell of the Nassau County Police Department, Lt. Frank O'Shea of the Nassau County Police Department, Commanding officer of the Sixth Detective Squad, and Nassau County Detectives Harold Shephard and Clifford Crawford, both of whom are assigned to the District Attorney's Squad.

At that Holzman placed a telephone call to the telephone number 212-GR 7-3300. The subscriber of that telephone number is the Charles French Restaurant, Inc., located at 452 Sixth Avenue, New York City.

Appendix B

This telephone call was made from the Oaks Pharmacy in Roslyn, County of Nassau, State of New York, and the telephone call was monitored and recorded with the permission of the owner of the Oaks Pharmacy.

Q. Holzman knew about it too, I assume? A. And Mr. Holzman. In this conversation Mr. Holzman asked for Sally Burns and Burns got on the telephone.

Mr. Holzman told Burns that someone had been in the phone booth and he had to wait.

Holzman then said to Burns, "On that conversation yesterday, you know, first of all, I don't have any method of raising $25,000 for the family and I think that that should be reduced.

"I think that your request is a little bit out of line."

That he, Holzman, had put in 26 years in this business and that was a big chunk to give away.

Burns said to Mr. Holzman, "Alright, let me say this to you. You know the way I feel about you and I feel worse than you do about what happened, and I want you to know that's an outside faction."

Burns said that he would explain it to Holzman when he saw him. Burns said that it wasn't his people, his friends.

Burns told Holzman that he would explain to Holzman what was involved and what the past history was to this thing.

Burns said to Holzman, "Between you and I as far as a lot of things that have transpired where I was mentioned, et cetera, and so on, to me it's unimportant.

"I'd like, I'd like, I'd love to be with you and I want you to be with me, but I want to start off right.

"If you feel that you want me— Do you want me to be with you?"

And Holzman said to Burns, "Well, I told you yesterday that with you I could get along but as far as these

fancy figures for me to go on financing and stuff like that and to have to, you know, the thing is it don't add it up, Sal, it just don't add up."

Burns then said, "Well, then I will tell you what you better do, Irv.

"The first thing to do, Irv, the best thing to do if you feel that way about it, 'cause I want to explain, see, I would, I would help you in that situation myself.

"I don't want to come in there for nothing, you understand. I don't want to come in there for nothing, but I must explain to you better than I did yesterday what the, what it involves and how many different—

"There are different elements involved here, you know, that wanted to take a shot at you.

"You understand what I'm talking about?"

Holzman said, "Yes, but that deal yesterday, that is the worst part, you know, I can't understand why you couldn't have stopped that."

And Burns said, "Well, no, no, I will explain you that, too. This was an outside thing where other people wanted to come into the picture.

"Now, the thing is either I have to know that I'm in there or I'm not in there, and I'm not pushing you, take it easy and take care of her. That's more important.

"That is why I suggested for you to have dinner together and I think—"

And Holzman said, "Well, of course—"

And Burns continued and said, "—you'll feel better."

Then Holzman said, "I know first of all she's marked up pretty bad and I don't know when she'll be able to walk out of the house."

And Burns said, "Alright."

And Holzman said, "Whoever that was—"

And Burns interrupted him and said, "Alright, I will take care of that in my own way. You'll have satisfaction through my way, you understand, which I don't care to discuss on the phone.

"Let me take care of it and you will be very satisfied. I will take care of it my way because I found out more about the story.

"It wasn't my friends involved here. It was friends, but from other people."

Holzman then said, "Yes."

And Burns said, "If you understand what I'm talking about, I will take care of that. I'll have the satis—you'll have satisfaction there my way, understand?

"But as far as the deal what I want to do with you, Irv, I think you should come in today."

Holzman told Burns that he couldn't come in, and Burns said, "You can't?"

And Holzman said, "I can't leave her today. If I leave her I ain't going to have a wife, you know."

And Burns said, "No, no, that's more important. If she feels that way you stay home, but I would like you to come down, sit down and you and I, I think we can work the whole thing out. It could be worked out."

And Holzman interrupted and said, "Well, listen—"

And Burns continued, "It's bad for you to—I'm sorry—and, uh, if it can't be, it can't be, it's alright.

"Either way, whatever you say. You mean that you want to forget it?"

Holzman said, "Well, I—"

And Burns said, "I wouldn't want you to do that, believe me, as your friend I don't want you to do that."

Holzman said, "Well, Sally, look, the first request is way out of line. I just got through buying out an estate and I have no means of going out to raise that kind of money in cash.

If I have to go out and borrow it they're not, nobody is going to lend it in cash."

And Burns said, "Let me say this to you. We'll work that out because I could help you in that situation myself.

"I'll be part and parcel of it with you and when I explain it to you you'll know what I'm talking about, you understand?"

Burns then asked Holzman to again come in and visit him and Holzman said, "You know last night I was a little bit upset with the whole situation, you know, especially after I left you.

"I became upset myself. The thing is getting so that what's the sense of knocking your brains out if these things are going to happen?"

Burns said, "Well, there ain't nothing going to happen. That is what I want to eliminate, and that is the missing link with you, Irving, and you can believe what I'm telling you.

"Then you can do what you want. You can do anything you want. I told you that.

"As far as I'm concerned I think I'm a necessary evil in this situation and the way it will clarify everything all the way around and we can go forward.

"There'll be no nonsense involved and nothing else, and I'm telling you."

And then Holzman again told him, "I think that the 25 thousand is way out of line."

And Burns said, "The figure can't be changed, but here's what I'm going to do.

"I'm going to do something on my own to work it out."

And Holzman interrupted and said, "Sally, they've got to change the figure. I'm not going to go for $25,000. I told you yesterday.

I know I can deal with you but I'm not going to go for $25,000."

And Burns answered, "Look, you've made your mind up definitely that way, then there is no sense even meeting if you don't want to."

And Holzman said, "I don't say I don't want to meet but I say I'm not going for 25."

And Burns said, "But I want to explain to you, I'll do my best for what I have to do. I know what I have to do, but I can work it out.

"I told you I could work it out."

Burns then said, "Let me sit down with you and we'll discuss it and then maybe I'll go there and say, 'Look, this is what I'm going to do, I'm going, I am doing it on my own, this is for me,' maybe it will be a little different picture, but I can't pick your brain.

"I got to sit down and talk to you, you and I together."

Burns then asked Holzman to again meet him the next day and Burns gave Holzman his home telephone number CA 6-2638, and asked Holzman to call him the next morning at 10 o'clock and let Burns know whether Holzman could meet him at noon at the Charles Restaurant.

Burns said, "You just talked to me in the morning. I'll tell you what to do, call me tomorrow morning at 10 o'clock home," and further told Holzman, "Go outside and call me, and tell me if you's coming in and I'll meet you at 12 o'clock at Charles."

Burns then told Holzman, "If you want to call me, call me tonight," and Holzman asked him:

"Where? At home?"

And Burns told him, yes, he'd be home, but if he wasn't home to call him at this other number, CAnal 6-8509.

Burns told Holzman that, "That's Patrissy's; remember the restaurant downtown, the one on Kenmare Street," and he again gave Holzman the number CAnal 6-8509.

Thereafter, Burns gave Holzman another telephone number.

He said to him, "And the other number I gave you yesterday, I go there once in awhile for a drink, you know."

And Holzman said, "Is that the LW number?"

And Burns said, "LW."

And Holzman told him that he had that number.

Holzman then told Burns, "I'll call you in the morning."

On June 10, 1964, Holzman called Burns at CAnal 6-2638, the code number was 212. CAnal 6-2638 checks to Nancy

Granello, 215 Mott Street, Apartment A-1, New York County.

Nancy Granello is known to be the wife of Salvatore Granello, and this is Granello's residence.

The telephone number 212-CA-6-8509 checks to the subscriber Patrissy's Restaurant, 96 Kenmare Street, New York, New York County.

On June 10, 1964, when Holzman called Burns at his home he told Burns that he would call him at 12 o'clock at the Charles Restaurant.

Holzman didn't call Burns at the Charles Restaurant at 12 o'clock on June 10, 1964, and thereafter, during the afternoon of June 10, 1964 Dino Conte called Holzman at his home and told Holzman that Sally was waiting for Holzman's call and told Holzman further, "Well, you should call him and let him know if you want to see him or don't want to see him, 'cause he's waiting."

Conte told Holzman that Sally had left the Charles Restaurant and was now at the LW number. Holzman then called 212-LW-4-2523, the Headline Club, and spoke with Sally Burns.

Burns asked Holzman what happened and Holzman told him, "Do you know Dino just called me. I didn't want to call you.

"I'm upstairs you know. Bill Cahn posted a man here 24 hours. I don't want to call you from home with a guy sitting in."

Burns told Holzman, "Why don't you take a ride out? Two minutes. You know I waited for your call."

Holzman told Burns, "Well, the man goes with me, that's what Cahn told him to do."

And Burns answered, "Irving, look, I know you're home. It's allright. Do you want to see me or you don't want to see me."

Holzman said, "Well, I'm not coming into New York for a couple of days and I'm staying here."

Burns then said, "I would like to see you on this one way or the other. I know what you want me to do and I'll know what you want me to do, and I'll get away from the picture altogether."

And Holzman told Burns that he'd see him when he came into New York and as soon as he came into New York.

Holzman told Burns that he would be in New York on Monday. Burns told Holzman, "I understand, but at the same token you know when I tell you, Irving, I waited for you, I don't go no place, I wait for you." Holzman told Burns he was sorry.

Burns said to Holzman, "It's important to me, too, you know what I mean."

Holzman said, "I was doing this for you, not for me." And Burns said, "Okay, buddy. Look, try to get in touch with me Friday morning."

Holzman said, "If not, you will hear from me."

And Burns said, "I go up to the country."

And Holzman said, "If you go up to the country you will hear from me Monday before 12 o'clock."

And Burns said, "In fact, I'll tell you the truth, what I would like you do Saturday or Sunday, put Ruth in a car and come up to the house and stay the whole day with me and she'll be a new woman; that's what I would like you to do."

And Holzman said, "Well, where is this place?"

Burns said, "It's in Greenwood Lake."

Holzman said, "Greenwood Lake is a big place."

Burns said, "Well, I could give you the whole instructions. You come right over the mountain and in fact, Dino will come with you and show you the place."

Holzman said to Burns, "Let me put it this way. If I can convince her to go up I will call you Friday morning at the house."

Burns said to Holzman, "Well, you do that, call me and give her my love."

Holzman said to him, "And don't forget I didn't call because—" And Burns interrupted him and said, "Allright, but I wanted to hear from you, Irving."

"You know how I am when I do something, I do it right."

Holzman said, "But you know where I am, too."

And Burns said, "Allright, I don't care. I don't care who's there, and who's not there. With me I'm one way.

"If I have to do something for you I'll do it, and if we don't want to do it, forget about it.

"So you call me Friday morning. If you come in early call me."

And that was the end of the conversation.

On Monday, June 15, 1964, Holzman met with Burns at his New York office at 583 Tenth Avenue, New York. The meeting was set up after a telephone call from Holzman to Burns at Burns' home, CAnal 6-2638.

During the course of the meeting at Holzman's office Burns gave Holzman his Greenwood Lake telephone number, code number 914, GR 7-2439. The telephone number 914, GR 7-2439 checked to the subscriber Nancy Granello, Lakelands, Greenwood Lake.

Nancy Granello is the wife of Salvatore Grannello, alias Sally Burns.

On Tuesday, June 23, 1964, Holzman again met with Salvatore Granello-Sally Burns at his New York office. At that time Burns asked Holzman for $12,500 for the family, and he told Holzman that Holzman should make a $5,000 down payment by that coming Friday.

He told Holzman, "You can't keep stalling." And he advised Holzman, "If you don't want to make a deal with them I'll bow out."

Holzman told Granello that he would let him know by Friday or the latest Monday.

On Friday, June 26, Dino Conte called Drutman, an employee of Holzman's at Holzman's office in New York

and told Drutman that Irving made an appointment and didn't keep it and that is no way to act.

On Monday, June 29, Holzman called Granello and told Granello that he wasn't going to give any money to the family and he wasn't going to give Granello any part of his business.

Granello told Holzman, "Okay, buddy, I'm bowing out. Now you're on your own."

On Tuesday, June 30, Delores Billing who is the married daughter of Irving Holzman received a telephone call at her home. Her telephone number is OV-1-0271. The call was received at approximately 10:20 a.m.

The caller said to Delores Billing, "Delores, if your father doesn't cooperate we'll come to Sylvia Lane and kick your fucking pregnant belly in."

Holzman's daughter resides with her husband, Ronald Billing at 65 Sylvia Lane, Plainview and she is presently pregnant.

During the course of this investigation I spoke with Joseph Albino who is a business associate of Irving Holzman. Both Holzman and Albino told me that they knew Salvatore Barbella also known as Rocco Barbella, also known as Rocky Graziano.

Albino said that he entered Mercy Hospital on Thursday, June 18, 1964, for an operation. He said that on Tuesday, June 23, 1964, he received a telephone call at Mercy Hospital in Rockville Centre, Nassau County, New York, from Rocky Graziano.

Graziano said to him, "I met a guy on the street in New York who walked up to me and said, 'Your cousin is in the hospital.'"

Graziano asked Albino if he could come to see him in the hospital. And he also said to Albino, "I understand your partner, Irv, and you are having a little trouble.

"I can't talk to you on the phone. Can you read between the lines? Can I come up to see you?"

Appendix B

Albino told Graziano that he could come to see him at Mercy Hospital.

Graziano, acording to Albino, didn't come to see him in the hospital, but on Sunday, June 28, Graziano during the morning stopped at Albino's home in West Hempstead.

Albino told me that Graziano said to him that he Graziano was sitting at a table with guys the other day and these guys were talking rough. "They said they were going to hurt your partner, Irv, and you."

Graziano said to Albino, "I told them you were my cousin and that they shouldn't hurt you." Graziano then asked Albino, "What did you do to aggravate them? You must have done something."

Albino told Graziano at that time that he had nothing to do with Holzman's business in New York; that he was only his partner in Nassau County and in other parts of Long Island.

Graziano then asked him, "What did Irving do to them?" At that point Albino told me that he told Graziano that Sally Burns wanted $25,000 in cash from Holzman for the family and 25 per-cent of his business.

At that point Albino said Graziano said to him, "Don't take sides. If you're asked you stay neutral. Don't worry. You're not going to get hurt."

At the end of the conversation Graziano said to Albino, "The guys want to know an answer. Tell him the guys are waiting for an answer."

In regard to Robert Luttman and in addition to the testimony that I've previously given with regard to Luttman I wish to state that Holzman told me that approximately seven months ago he was engaged in a conversation with Luttman about women; and during the course of this conversation Luttman indicated to Holzman that he was being kept by a woman who gave him thousand-dollar bills as spending money.

Holzman said to me that during the course of this conversation with Luttman he made up a story which he told Luttman that he, Holzman, was keeping company with a Copacabana chorus girl named Joyce.

Holzman told me that he didn't know any Copacabana chorus girls, let alone one named Joyce, and that he wasn't keeping company with any woman.

He said that he made this story up during the course of his conversation with Luttman. Holzman further stated that at the time of his meeting with Salvatore Granello alias Sally Burns on June 15, 1964 at his business in New York City Burns said to him, "I did you a favor. I know a shylock who works at the Copacabana and I told him to tell Joyce to forget you because you're a married man."

Holzman stated to me that this information couldn't have been given to Burns by anyone other than Luttman because Luttman was the only one present when he made this statement.

On June 30, 1964, Detective Fred Pawel and Detective Thomas Costello of the Nassau County Police Department assigned to the District Attorney's office, were in Patrissy's Restaurant.

On that occasion they observed Salvatore Granello alias Sally Burns in the bar of that restaurant. During the course of this surveillance of Salvatore Granello alias Sally Burns, Burns used two public telephones.

The telephone numbers of these two public telephones are CA 6-8509 and CA 6-8854. The telephone number CAnal 6-8854 is listed to Patrissy's Restaurant, 98 Kenmare Street, New York County, New York.

I wish to correct for the record, your Honor, I had earlier said that Salvatore Granello alias Sally Burns was presently under indictment charged with rape as a felony.

On July 19, 1963, that indictment was dismissed and I was in error when I told you that the indictment was pending.

Appendix B

On July 17, 1940, Granello was arrested by the State Police, Trenton, New Jersey, and charged as a disorderly person and received a sentence of ten days.

On October 6, 1940, he was arrested in Manhattan for assault and robbery and the final disposition of that case was a conviction for assault in the third degree.

On January 29, 1949 he was arrested in New York City and charged with violation of the Selective Service Laws and prosecution was denied by the federal authorities thereafter.

On July 25, 1947, he was arrested in Manhattan and charged with Grand Larceny. That charge was discharged in Manhattan Felony Court.

On January 14, 1959 he was arrested in Brooklyn and charged with 887 of the Code of Criminal Procedure, subdivision 1, vagrancy, and that charge was dismissed.

He is presently under indictment as I've previously testified and charged with income tax evasion.

On this indictment his co-defendant is one George Levine. George Levine is the stepfather of Rocky Graziano. Joseph Albino informed me that Graziano is the Godfather of Granello's youngest child, a daughter.

Mr. Levy: Your Honor, on the affidavit of Norman J. Levy, Assistant District Attorney, and the sworn testimony of Norman J. Levy before your Honor, the People make application to intercept and record all telephone communications over a telephone instrument bearing telephone number 212-LW-4-2523. This telephone instrument is located at 252 West 43rd Street, New York County, New York.

The subscriber of that telephone is the Headline Bar which is located at 252 West 43rd Street, New York County, New York.

The basis of the People's application, your Honor, is the affidavit by Norman J. Levy that is before you and the sworn testimony of Norman J. Levy which you have heard.

Appendix B

The Court: Mr. Levy, have you been trying to verify whether the daughter of Holzman was in fact threatened?

Mr. Levy: Your Honor, Detective John Skuzenski of the Nassau County Police Department assigned to the District Attorney's Squad interviewed Mrs. Delores Billing at her home on Sylvia Lane yesterday and the facts that I testified to before your Honor were stated to Detective Skuzenski by Mrs. Billing.

The District Attorney's office and the Nassau County Police Department are working on an investigation to identify the caller.

The Court: At the present time have you been able to get any clue which would lead you definitely to the caller?

Mr. Levy: We have not, your Honor.

The Court: You feel as though this tap will assist you in that quest?

Mr. Levy: Yes, your Honor.

The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holzman, in regard to the demand for $25,000 and 25 per-cent of his business.

The Court: So that in addition to the alleged extortion you are faced here with the threats of violence and physical harm to innocent people?

Mr. Levy: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billing.

The Court: I am satisfied that there is reasonable ground for granting your application.

Appendix B

The Wire Tap Order

COUNTY COURT

NASSAU COUNTY

In the Matter of the Application of *Norman J. Levy*,* an Assistant District Attorney of the County of Nassau,

for

an ORDER FOR INTERCEPTION OF CERTAIN TELEPHONE COMMUNICATIONS,
212 LW 4-2523.

Upon the annexed petition of *Norman J. Levy* and the sworn testimony of *Norman J. Levy* there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing telephone number *212 LW 4-2523* located at *255 West 43rd Street, New York, County*, New York, it is

ORDERED that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County, and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any all persons employed or assigned to the control and direc-

* This is a form Order, and the filled in blanks are designated by italics.

tion of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by incoming and outgoing calls over the telephone located at *255 West 43rd Street, New York County, New York,* now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated, and it is further

ORDERED, that the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, or their duly authorized agent, or agents, be, and they hereby are, authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instrument that the said District Attorney of Nassau County or said *Norman J. Levy,* or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire and to do all things necessary to permit the communications being transmitted over said telephone instrument to be intercepted under and pursuant to the provisions of this order; and it is further

ORDERED, that this order shall be effective and in force until *the 29th day of August, 1964.*

Dated: Mineola, New York
July 1, 1964.

HAROLD M. SPITZER
County Judge of Nassau County

APPENDIX C

Stenographic Transcriptions of the Two Wiretapped Conversations to Which the Petitioner Was a Party, the Original Tape Recordings of Which Were Received in Evidence Against the Petitioner

RB 2-27 #8A DJW
7-3-64—7-5-64—1800-1015
approx. 137-306

RCO-5 R1

A Headline Lounge.
1 Dino, please.
A Sure.
2 Hello.
1 Yeh, captain.
2 What's happening?
1 What's the good word?
2 Nothing.
1 Huh?
2 Nothing,—
1 What happened?
2 —nothing.
1 Well, he ranted and raved today.
2 Yeh.
1 He told me—uh, he didn't tell me. He told—uh, Dave come over and, uh, he told us he told the family he was talking to Sally on the phone and he slammed up the phone on him.
2 Sally slammed the phone on him?
1 No, Holzman slammed the phone up on Sally.
2 Yeh.
1 And he threatened Joey.
2 He threatened Joey?
1 Yeh.
2 Naw, he didn't.
1 He said he threatened to do something to hurt Joey on 111th Street, and, uh, Joey's in the hospital now getting, having a hernia operation.

2 Naw, you see, uh, this is what Holzman said; that Bob went in there and that Bob told him that, "I don't want to give Sally Burns fifty per-cent of my route." And there was too much loose talk where it was going back. The whole thing was handled very bad.

1 Yeh, well, I told you that from the beginning, D.

2 Well, we're out of it. I'm, I don't want to discuss it no more. I don't want to have nothing to do with it.

Forget about it, that's all. I don't want to have nothing to do with it. Let them, uh, you know, whatever happens let it happen, 'cause I don't want to have nothing to do with it, 'cause who knows what's going to happen now. So, that's that. See what happens.

1 So he says, uh, now that, uh you know why should I get this fucking deal and fucking. What's with this thing with Sally Burns. Fuck him."

2 Yeh. Well, that don't mean nothing.

1 He had different things about Joey. He says, "I'm going to tell Joey to go to the District Attorney when he comes out because he threatened him," threatened he was going to, going to hurt Joey for some reason. I don't know what the fuck he said that about Joey for.

2 Who?

1 Sally.

2 Sally didn't say that.

1 Yeh. He says, he says he threatened Joey over the phone.

2 No, he didn't. He's full of shit.

1. And he says he slammed up the phone on him.

2 Maybe he did. I don't know. Maybe he did. Maybe Sally did threaten him. I don't know. Who knows.

1 What did Joey do?

2 Huh?

1 What did Joey do?

2 I have no idea. I don't know what, uh, he's going to do. He said forget about it. It's all over, that's all. We took the shot and that's—

Appendix C

1 Yeh.

2 —the end of it, that's all. Forget about it. It's nothing to discuss no more. Took a shot and it didn't work out; that's all. What's the hell; going to hurt people for something that didn't work out? Forget about it. That's the whole thing. That's all. Tell Bob to drop it; forget about it. I don't want to have nothing to do with it no more. It's handled bad and that's all. Took the shot and it didn't work, that's all.

1 Yeh.

2 Let him forget about it now.

1 Yeh.

2 That's all. That's the best thing now. Why get in trouble now? After didn't gain nothing out of it, so—

1 Yeh.

2 So let it go now.

1 Yeh, that's the best thing. That's what I told you that night to forget about it.

2 Yeh. Well, now it's all over—

1 'Cause I knew the fucking man was going to do that you know?

2 Yeh, well.

1 Especially being that it started the way it did, you know. It didn't pay.

2 Well, listen that's all.

1 Thank God he didn't go out there, that's all.

2 Yeh, probably.

1 'Cause he would have wound up in jail. What else is doing? How's business?

2 Well, it's all right. Not bad.

1 No problems?

2 No.

1 Yeh. Where's—Oh, uh, there's no question McGloyne's still alive. He's over here with his whole fucking gang of kids.

2 Yeh, huh?

Appendix C

1 Yeh, he's putting them on the fucking rides here. So I got to hide in the office here so he don't fucking capture me.

2 Hm.

1 'Cause if he saw me—And, uh, I got to, I got to keep ducking him, you know, hide so he don't fucking capture me here.

1 'Cause I didn't even say nothing to him. I kept walking. I looked at him. He looked at me and I just kept fucking walking, you know. But he's got, he's got a little hat on him. He's got, well, he's got at least four kids with him walking around there like a proud poppa.

2 Yeh. All right, that's all. See what happens. Whatever happens, happens.

1 All right, tiger.

2 Yeh. Tell Bob to drop this now. Now, let's not have, you know, not to keep on talking about it and everything.

1 Oh, no, there's nothing. I, I told him it's all over, forget about it, nothing to do. Shouldn't happen.

2 Well, he didn't fire Bob?

1 No, he didn't hear nothing today. But, uh, he wasn't in the office when, uh, when he came in he wasn't in the office; probably still out at his house.

2 Yeh.

1 So, uh, he didn't see him, you know.

2 Oh, he didn't go in today, Holzman?

1 No, he just stayed in the house.

2 Hum. Well, who knows.

1 So, uh, he didn't see him yet to—so, I don't know, you know, he didn't see him to get the good news or what.

2 Huh?

1 I don't know it's 'cause he didn't go in, you know.

2 Yeh.

1 Maybe he was afraid to go in and, I don't know, give him the good news, but he—I saw him before I came over here.

Appendix C

2 Well, who did he tell he slammed the phone down on Sally?

1 This morning he told, uh, Dave.

2 Uh, huh.

1 He was telling him he's not supposed to phone him like that. I slammed the fucking phone. I don't talk to a fucking animal like that.

2 Yeh, well, it's best to forget about it; that's all. It was handled very badly and that's it, that's all.

1. Yeh.

2 See, actually, you know, nobody should have known about it because there—you know, Sally fells definitely there was some way this guy knew that it was him, you know, handling the whole thing.

1 It was who?

2 That it was Sally, 'cause he told him that he knew, you know, that it was Sally.

1 That he knew it was Sally?

2 Yeh.

1 Well, he'd have to a fucking idiot to really actually not to surmise it.

2 No, he told him that he was told. He says, "I know it's you. I was told. I know where you're getting the information."

1 Well, he was—that I knew all along. I—

2 Well, this is what he told him.

1 I knew the fucking man knew this all along. This I knew right along. I told you that. There's no question about it. He knew I was telling him things that was going on.

2 No, he didn't mean you.

1 Sure he meant me.

2 No, he didn't mean you.

1 Well, who did he mean?

2 No—he—I don't know. He didn't mean you.

1 Huh?

2 He didn't mean you.

Appendix C

1 He didn't mean me that was telling the—

2 No.

1 —information?

2 No.

1 Well, who did he mean?

2 Well, he doesn't, he didn't mean that information there.

1 Huh?

2 He didn't mean that. I don't know who he meant, because—but I know he didn't mean you.

1 In reference to what?

2 I don't know; something else. Aw, forget about it. The whole thing is done with now.

1 Well, you're not, you're not explaining it to me. Why don't you explain it to me what you're, what you're talking about.

2 No. He seems to have known something that, uh—aw it doesn't make any difference.

1 Known what? What could he have known?

2 He knew something. I don't know how he found out, but, uh—

1 First of all, the man would have to be a fucking idiot, don't you understand?

2 Yeh.

1 The man from the beginning kept roaring, "Who put this fucking man on me? Who is this man to come in here and tell me about Harold Thompson, about this guy, about that guy? Who put this fucking man on me?" This was his ranting and raving from the beginning: "Somebody put this fucking man on me, that he's doing this—"

2 Well—

1 "—that he's making the move," he's raring and raving. He was, he told Dave, "This fucking man tells me, 'Nobody goes as far as you do in this business unless he's with somebody.' He says, 'Can you imagine this fucking

bum telling me this to my face? Nobody can go as far in this business on your own ingenuity unless you're with somebody.' He says, 'He comes out and tell me this to,'" his face.

2 Well—

1 Don't you see the fucking game this guy plays?

2 Well—

1 I told you this from the beginning that it was—I told you what, what should have have been fucking done in the beginning. If it would have been handled the way I told you in the fucking beginning, it would have been done and it would have been over with now.

2 Well, it's—forget about it.

1 First he wanted $5,000. Then he wanted, uh, 25,000. Then he wanted twelve-five. He was fucking ranting and raving. He was fucking ranting and raving.

2 Well, what are you going to do. The best thing is to forget about it now. Best thing is to forget about it. That's the whole best thing.

1 But you see you have to see that, uh, the man, that, uh, you know Holzman has to be a fucking complete fucking moron—

2 Yeh.

1 —not, not to surmise what was going on.

2 Well—

1 You know the way this man came out with things. You know he came out with things the wrong way, Dino, I told you that.

2 Well, listen, you can't tell him what to do so—

1 Well, I mean, I told him things and he went over there and he said it word for word practically. He said it word for word. He said it word for word about Joey. He said about that fucking broad in the Copa; instead of bringing in the fucking situation with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to. And he was, you know, to

straighten it out, instead of just walking in there and, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last. You can't make a statement like that.

2 Well—

1 Well, don't—wouldn't the guy have to be a fucking moron, Dino?

2 I don't know.

1 This is the same as it was with Kinto's troubles, straightening this out, straightening that. You's have to be a fucking—like these kids on these rides out here not to know that.

2 Yeh, but, see now, it's a it's a bad situation. Oh, well, forget about it. Look—

1 Of course it's a bad situation now. It's a—

2 Now you got to drop the whole thing.

1 Huh?

2 You go to drop the whole thing. It's the best thing, you know. Tell him to forget about it, that's all. It's all over.

1 Well, what I would do—of course, the man, you know, uh, can do what he wants. If he feels it's dead, it's dead.

2 Naw, it's a dead issue now.

1 But what I would do is maybe wait a month—

2 Naw, naw, the ber—don't, don't even want to, uh, he doesn't want to even go through with it; discuss it no more. You know. That's the best thing. Because, uh, it was handled so badly that it's uh, no good no more. It's you can't do nothing no more.

1 Yeh. Well, it wasn't handled by me badly, Dino.

2 No. Who's saying that? But, uh, but, uh, you know, he says forget about it. So the best thing is forget about it, huh.

1 The fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly.

2 No.

1 You understand?

2 But he's not talking—

1 I brought, I brought the man over a fucking shot for you and for him, so, I mean there's nothing to say that, uh, that, uh, what I did was, uh, inaccurate or I did things stupid.

2 No, not you.

1 So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong and, uh—

2 Yeh, he knows that. He realizes that. He realizes it. He knows it. He knows that it's wrong. That's all. So, see what happens. Who is that, uh? Uh, well, whatever happens, happens; that's all. Best thing is to forget about it now, you know. This guy running to Cahn and everything, you know—

1 Yeh.

2 —it's no good, you know.

1 Yeh. Well, I knew all that was going to happen.

2 Yeh. Well, well, let him go to Cahn. Because there's nothing they can do 'cause Sally's forgetting about it.

1 Yeh.

2 He's got nothing to do with it no more; that's all. You know—

1 I—

2—I thought he would, he would, you know, become ranting and raving and everything, but he's not. He says, "Forget about it. It happened, it happened."

1 Yeh.

2 That's all.

1 The only thing is, uh, tell him, uh, I don't know what transpired with Joey, but whatever the story was the way he sounded that, uh, Sally threatened Joey over the phone. He threatened to jump him on 111th Street, something about 111th Street uptown, and, uh, I know he's got a joint

up there on 111th Street. He's got a box in a joint up there. Now, I don't know what it was about, but, uh, uh, Joey just went into the hospital on, for a hernia operation. He told him that he said, he told Dave that, uh, uh, that he said you know while Dave was there that's he's going to, uh, go see Joey and tell Joey to go to the District Attorney's office; he was threatened by this guy. So I don't know. Maybe he's liable to talk fucking Joey into doing it, but, uh, I don't know what transpired between them.

2 Naw, forget about it. The whole thing is forget about it, you know. Just stay away from the whole thing.

1 I don't know what transpired between him and Sally.

2 I don't know either. Best thing is to forget about it. That's the best thing right now, you know, I mean 'cause it was, it's all over. He says—no—he went, he went away. He says, "Look, we took a shot and—

1 Yeh.

2 —that was it, you know."

1 Where did he go up to Greenwood Lake?

2 I don't know. I don't know where he went. It's all over with.

1 Well—

2 Forget about it.

1 —as long as he don't think that there was anything, uh, stupid that, uh, was done through us, that's all.

2 Now, he, he said to forget about it and that's it, you know.

1 That's the only thing. Uh, you know, I don't want him to think that, uh, that, uh stupid things done through us.

2 Naw.

1 It wasn't. Everything was accurate.

2 Oh, he knows that. That he knows. Uh, it's just that, uh, he handled it bad on his own, that's all. He said it yesterday. He said, "Look, if I couldn't handle it,"

he says, uh, "it was my fault," that's all. And, uh, what, whatever— He says, "Whatever's happened, happened, that's all." He says, "Maybe it's for the best. Maybe I would have got in—" He says, "Maybe I would have got in trouble with this guy," you know.

1 Yeh.

2 So, that's it, you know.

1 All right.

2 But, uh, I'll tell you this. I know that, uh, some other people interested in this guy.

1 Yeh.

2 This I'll tell you for sure. So—

1 Well, let him deal with them then.

2 Well, that's what's going to happen.

1 See what they have to say.

2 That's what'll happen. That's, that's the eventual outcome.

1 See if they do it right,—

2 So—

1 —right?

2 Yeh. Maybe they'll be more successful.

1 Maybe they be more successful if they make a right move.

2 Yeh, all right. 1—All right, Dino. 2—All right, I'll see you, Tom. 1—Yeh. 2—So long. 1—I'll see you next week probably. I'll come in the city. 2—All right. 1—All right, kid.

RB 2-27
480-818 #8BDJW (Same as reel 8A)

A Headliner.

1 Dino, please.

A Dino? Dino.

2 Hello.

Appendix C

1 What's happening, anything?

2 No, no, it's quiet.

1 Yeh.

2 What's doing?

1 Oh, it's jammed over here.

2 Yeh, huh?

1 Oh, what a fucking day. What a day.

2 Well—

1 Been like this since twelve o'clock noon.

2 Yeh, huh?

1 And it, it broke a little bit about seven to eight, you know. I guess they were eating. Now it's fucking jam packed here again.

2 Sure.

1 Sure, today and tomorrow some fucking days.

2 Well, well, that'll be—It's a hell of a thing over there what he's got there.

1 But then at the—but, uh, then uh, you know, the kids they go, in this area they go to camp, you know they send them to camp and all that shit.

2 Yeh.

1 So, uh, uh, he says, you know, the rest of the summer is basically the, just the weekends, you know. But the weekdays aren't too much, 'cause a lot of kids—then a lot of the people out this way, you know Douglastown and, uh, Bayside, they go away for vacations, you know.

2 Yeh.

1 They go to the mountains and all that fucking shit.

2 Yeh.

1 You know, two weeks here, two week there. That cuts it down. It's a fantastic fucking weekend here.

2 Sure.

1 But I imagine you, you're going to feel it in the city a lot of people go away.

2 Naw, it's dead; dead last night.

1 Oh, was dead last night?

2 Yeh.

1 Yeh, a lot of them go away. That Fourth of July weekend knock your brains out.

2 Plus that Goldie and the Gingerbreads opened up at the Wagon Wheel there.

1 Oh, did they?

2 Yes.

1 Yeh. I thought they weren't going to play over there.

2 Well, that's where they are. So, that's that. Well, see what happens.

1 Yeh. That'll really knock the jock off 'em.

2 Well, sure.

1 Who was that that answered the phone? Murray?

2 Yeh. Uh, no, Bobby Greco.

1 Oh, yeh. How's Murray?

2 He's all right, took off last night.

1 Took off?

2 Yeh.

1 What the fuck is he taking off on Friday?

2 Well, he's the boss now.

1 Oh, he could afford to do that now, huh?

2 Now, he could do that. Well, you got to let him be the boss, that's all. That's the only thing.

1 That's all you got to do, "Is this all right, Murray? What do you think of this?" Then you go for the eyeballs, right?

2 Yeh, yeh, that's what you got to do with him.

1 "Is this all right, boss?" All right.

2 Yeh, that's what you got to do with him. That's the only answer.

1 I saw a thing in the paper there about that Sweet Chariot, about the, uh, the people that owned the Sweet Chariot opened up a delicatessen on 49th Street called Mr. Kiska.

2 Yeh.

Appendix C

1 Did you see that?

2 Yeh, that's where the Rialto was.

1 Where that is?

2 Yeh.

1 Oh, yeh?

2 Um, hum.

1 Oh, the Rialto's out altogether now, huh?

2 Yeh, so's Mattie's Towncrest.

1 Oh, the Towncrest is out?

2 Yeh.

1 Yeh?

2 Well, he got a thirty-day injunction.

1 Yeh, I thought I saw that. I passed there last week. I thought I saw it open.

2 It was open but he got a thirty-day injunction.

1 What about the Casino and that?

2 Well, that they didn't get to. Scotti went up to Hofstedder and told him that Matty was a big Mafia man and they went on Scotti's word.

1 Yeh.

2 And they cancelled the license.

1 Yeh, that's what the bitch about the fucking liquor license. No other business in the fucking world could you do that, see.

2 That's right, yeh, just on his say-so.

1 Meat markets and everything couldn't do that, but that fucking liquor license, forget about it.

2 He won, he won. He beat them in everything. He won all the battles, but he lost the war. It's the old story

1 That's right, that's the case.

2 Well, there was nothing he could do about it. There was no— This guy was out to get him and that was it, out to—

1 They can give you a, they can give you one of a million excuses to cancel a liquor license.

2 Uh.

Appendix C

1 That's all they got to do is want to get on you, that's why I say this fucking business.

2 Uh, that's all he did was go up there and tell them he was a mafia man, no proof, no nothing, and that was it, and he blew the—well, blew the license. So, that's that. That is that. That's what happens to you. Nothing you can do about it.

1 Well, he don't have to worry.

2 Naw.

1 He must have a few dollars, huh?

2 Yeh, plus the, the other joints'll run you know.

1 Yeh, sure, they'll run.

2 He's starting—

1 Maybe he'll let his brother run them and get out of town.

2 No, he's going to, he's going to start buying a few more now and just keep them, you know.

1 Yeh.

2 Till things cool down he says, and then later on, "I'll, I'll won't be on the scene no more, that's all."

1 Yeh.

2 "I won't be. It's only me, you know." See, they want, wanted to knock off the Towncrest because that was like a symbol there—

1 Yeh.

2 —Matty's Towncrest. And that's it, that will be it.

1 Geez, you know what's a nice-looking place, that Golden Horn.

2 Yeh.

1 It's a pretty looking place when you pass it. Is he doing any business in there?

2 Well, I don't know.

1 It's pretty to pass. They got it lit up nice, you know.

2 Yeh, yeh.

1 They got, uh, a nice attraction in the window there you know.

2 Yeh. Well, he put belly dancing there now.

1 Oh, he's got the belly dancing there, huh?

2 Yeh, yeh, yeh. Well—

1 Geez, you know, what's funny, I meet so many customers from the, uh, Town and Country Club in here.

2 Oh, yeh?

1 Yeh. Either her or next door at the driving range, you know?

2 Oh, sure.

1 So many fucking people come in, customers, you know, that must live out here, in Great Neck, or Bayside—

2 Yeh.

1 —right around the area here. Yeh, I met so many of them next door today.

2 Listen, find a victim over there, will you?

1 Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place.

2 Well, find one. Jesus, I'm starving over here.

1 Pulling out of this fucking driveway here.

2 Find a victim there.

1 That's for sure.

2 Sure, we got to find a victim. Now, we, we lost Holzman to now we got to find another victim. Find somebody else out there.

1 Well, we'll see what else comes up.

2 Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks.

1 Well, just be careful now, that's all, be fucking careful.

2 Well, see what happens.

1 That's the only thing I want you to do.

2 Well—

1 Don't take no fucking wacko chances here.

2 Aw, there's no chance to take.

Appendix C

1 How's Bobby? Is Bobby still over there?

2 Yeh, but, uh, I'm not, uh, dealing with them no more. I got a new, uh, crew here.

1 Yeh.

2 Yeh. Older, more experienced in the field of operations. See, you got to form a unit just like they have in the, you know, like the special forces in the Army, you know?

That's what you go to do. You got to form a unit you know with—

1 Yeh.

2 —with, uh, with, uh, walkie talkie and everything, the whole thing.

So—I seen that picture, the Asphalt Jungle there with the great jewel robbery there. So maybe we'll come across something like that. But we'll see what happens.

Either we'll make the papers or, or we'll—next episode we'll make the papers all right. We'll make the newsreel. Gabe Pressman will be interviewing everybody in it, like he did in the last time.

1 I had a—I had a thing a guy was talking to me about. Uh, when I come over I'll tell you about it.

2 It's got to be substantial though, you know. Listen, when the guy told me about this thing that time on Park Avenue, it didn't make any sense but—

1 You know I had to laugh at myself. I was in the store there, the drug store, I saw a picture of Max Factor. Geez, I wonder if he's got any money.

2 Heh, heh.

1 He's he's pretty big in that business, too, you know.

2 Yeh.

1 When I come over I'll tell you about it, what this guy told me. The—see what, uh—

2 What's our boy, Irving, doing? Is he, is he—He's not leaving the house, huh?

1 No, he's still in the house.

2 Yeh.

Appendix C

1 H's fucking terrified.

2 He's not coming to New York, huh?

1 No, he won't, he probably won't for a while—

2 Well—

1 —but, uh, that'll wear off. He'll be back in action.

2 Yeh, yeh. Meanwhile, he has to stay cooped up there.

1 Yeh, they're all out there. There's the daughter, son. They're all, uh, living out there.

2 Well, listen, maybe he's better off, you know.

1 He closed the, uh, he closed the New York office down Friday, yesterday—

2 Yeh.

1 Nobody over there, but he—

2 Well, what is he going to do with the Great Neck office?

1 I don't know what he's going to do with it, going to get rid of Nick.

2 And who's Nick?

1 Nick is the guy that, uh, (Indistinguishable) kid is out there, but he really doesn't know, but he's the only one that's been going in. The kid has been going in.

2 Well, maybe, maybe he'll, he'll want to call up anyhow, Holzman. Maybe he'll want to speak to somebody, Irving. So, see what—

1 Well, you never know. He'll be left alone for a while. See what develops with him, right?

2 Yeh. Well, I know what's going to develop so—

1 The man can't, uh, the man can't, uh, stay there forever, right?

2 Yeh. Well, he can never come into New York again though.

1 He's got to come out. He's got to function. He got to make—he's got to keep the, the route functioning. If he don't, if he doesn't he loses the fucking route. If he can't make these tremendous payments on his fucking route, you know, he'll lose the route.

2 He can never walk into New York again, he knows that.

1 Well—

2 The minute Lyn Durant is out. You know he's in, he's in Chicago now.

1 Who, Lyn Durant?

2 Yeh, but somebody, the other fellow's in Chicago, Sally.

1 He went to Chicago?

2 Yeh.

1 Yeh.

2 He left this morning. Now this guy is in for a little activity. He didn't think the—But, please, don't say nothing to even Bob no more.

1 No, no.

2 Because Bob said something to this guy and it came back to Sally and—

1 Said what?

2 I don't know. Sally's blowing his fucking top. Started screaming at me and everything. He says—I says, "Look," says, I told him, I says "Tommy did the best." He says, "Yeh," he says, "but there, there was a leak from one of the other people." Either Dave or somebody must have caught a hint of something. Or Bob, you know. You never can tell.

1 I told you before, Dino, the man would of had to been a fucking moron not to know what was going on, the way it was done. Don't you understand? Now, naturally when, uh, naturally when, uh, when Holzman mentioned to Bob that, uh, this man wanted to come in as a partner, "in my operations," you understand, he probably told him, "Well, you're not coming, he's not coming in a partner in my business."

2 Well, that's what I told him.

1 You understand? But what could he say? Dino, could he say, "Yeh, Yeh, uh, Irving, I, I think that that's

a good thing." Are you kidding me? He would of fucking crucified himself.

2 Yeh.

1 He would have crucified himself, because the fucking man has got his phone tapped. He knows the information's coming from him. He knows it's Sally from the fucking beginning. The man knows it. Don't you understand? He'd have to be fucking crazy. How many weeks ago did I come to you and I told you, Sal, Sal—Irving was telling everybody Sally walked in the office Friday—Monday when that event happened—and then after that he says, "If you would of went with me Friday this would have never happened". I told you that.

2 Yeh.

1 He was telling fucking people even though Sally meant it in a way that if people knew that he was with him it wouldn't have happened.

2 Yeh.

1 But he just as much as told him, "Well, I wouldn't, this wouldn't of happened if you went with me. You would of done as I told you".

He was going around telling fucking people that. I told you that two weeks ago, three weeks ago.

2 Well, I tell you one thing: Sally is determined he don't care if he gets pinched he told me. He says, "What are they going to pinch me for?" He says, "Let them pinch me". He says, "I don't care". He says, "Let him, let him go to the FBI and let him go to—"

1 But you fail to realize this is the situation, Dino. The man's not going to give a fucking inch; not an inch. Now—

2 Only if he can't function, Tom.

1 Yeh, only. And what are you going to do if he can't function? He loses the route.

2 Well, but this, this is Sally wants. He wanted to ask you that. He says do you feel that if he lost the route that uh, because uh—He's going all the way. He told me.

1 Well, that's all he's going to do. He's certainly not going to kill the guy, Dino, and uh, if he keeps this guy so terrified that he can't function, that Nick's got to function here, and this guy Red's got to function in New York, then—

2 Red does not function. Red's quitting Monday. Red is quitting Monday. Red ain't functioning in New York.

1 He's quitting?

2 Yeh.

1 Yeh? What makes you say that?

2 I'm telling you, he's quitting.

1 Well, that's that's why I say that's the only thing and now this is what's going to happen and, and you, the man will lose the route, you understand, but he's not going —uh, he won't accomplish anything like this. I, uh, to me this is wrong. I would let things go.

2 Well, no, Sally has these, these four notes from Irving for $25,000 a piece that he has here, you know. I mean, they're the one's due the 1st of July, it's past due already. The other one's due uh, uh, in August, and the other one's due in September, and the other one's due in October. One's past due already. So, uh, see what happens.

1 Four notes on what?

2 I don't know. Personal notes $25,000.

1 Four personal notes totaling $25,000?

2 Totalling $100,000.

1 Well, I don't know, I don't know anything about that.

2 This is how they came up. I don't know.

1 That was that, with that the other business you were talking about? With the, with the Graziano and the, the commercials?

2 No, no, they, they did something else. You know, uh, oh, that he's a partner in. Forget about it. Nobody can ever use that.

1 Yeh, well, I don't know anything about that—

2 Yeah.

1 —but uh, this here to me is uh, to me, is going about it the wrong way, Dino.

2 Well, you can't tell him nothing, Tom. You can't even say nothing. He's going—

1 I mean to terrorize this guy is, is wrong because within two, three months if things go wrong that he can't have the operation going right, and now, uh, he'll lose the fucking route.

Then, uh, then he losses the whole route, Dino. That's not only his deal.

2 Well, you can't tell, I'm telling you the guy went to Chicago this morning. I know what he went there for. This man does never go to Chicago no more 'cause the minute he steps in Chicago he, he gets, somebody'll be waiting for him, put him right back on the plane and send him back to New York.

1 Well, I don't know if it's the right thing.

2 Well, look, whether it's the right thing, whether it isn't the right thing, uh—See, I'll tell you what Sally told him over the phone.

He says, "Listen you cocksucker—" After Irving you know said, "Well, no, my partners don't want you," and this and that.

See, if he blamed it all on his partners.

1 Yeh.

2 He said, "It's not me. It's my partners. They don't want you." So Sally said, "Listen you cocksucker," he says, "I'm telling you now," he says, "you used my name a lot of times. You told people that I beat you for $2,500 with that Gallo business. I did it as a favor" which he did, he straightened it out as a favor.

1 Yeh.

Appendix C

2 —never got no money for it or anything and I didn't want anything." He says, "But you don't think you're going to use me now." So—and then Sally hung up on him.

1 Yeh, he said that he slammed the phone up on him.

2 Yeh, but it was reversed. Sally—

1 Yeh.

2 That's what's terrorizing him. He told him uh, he says, "I'll guarantee you you can't come to New York." And he meant it.

1 Yeh.

2 And this guy knows he meant it.

1 Yeh.

2 I'm telling you I know this man like a book. You know I've seen him do things, they've gone wrong with unions and other things, and he's he's backed off and said, you know, see because he wanted me to tell you, you know, well, I, see he doesn't know that I know you.

See, when you were here last night he was around, the other kid was around and Joey was around when I was talking to you over the phone, see.

1 Uh, uh.

2 So he wanted me to tell you just look, we're laying off, that's it, you know, it's none of our business no more.

We, we took a shot and what not, but I—see, I know what, how he is, you know. I know what he's going to do. That's the only thing, the only thing, you know, I don't want, I don't want to see Bob, you know, anything happen to Bob, you know in this whole business here.

1 No, nothing can happen to Bob, see nothing can happen to Bob. The only thing that can happen to Bob is that us, he's go actually he's got fifty percent of his, of Coin-A-Matic route, that uh, the only thing that can happen to Bob is of course he'll try to pressure him more, you know.

2 Well, if he pressures Bob—

1 Because everything that Sally does he's going to blame—If anything happens to Sally, like, say anything happens to Holzman—Now, let's just take a for instance.

Say Holzman went out was hit by a, by a drunken kid tonight, as a hit and run driver, Bob is in, Bob is in Mineola jail tomorrow morning.

1 How do I get outside here?

2 Yeh.

1 He's in Mineola jail tomorrow morning. They'll pick him right up and take him out there, 'cause anything that happens to him she's going to blame Bob right away because they're blaming him now.

You don't know what they're doing to this guy. He can't get his, he can't get his machines moved, Dino. It's it's a fucking pathetic. I feel sorry for him.

2 Yeh.

1 He can't get his fucking machines.

2 Well, maybe we're going to have to go out, uh, maybe, uh, maybe Sally'll have to become his partner, uh, you know, on the surface temporarily.

1 He can't get his fucking machines moved. You know what he's got? He sent some fucking drunk, some guy that used to do work for him before with a station wagon moving machines from bar to bar, you know, switching them in new locations, and that. The fucking National Truck won't touch him. Ronnie was saying, "Fuck him, let him, let his work pile up."

2 Where is this National Truck?

1 They're out here in the, in the back on a lot in back of the Peter Luger's thing.

2 Oh, by Peter Luger's?

1 Yeh.

2 He can't go by Peter Luger's anymore anyhow.

1 They got a—

2 How many trucks do they have?

1 Two.

2 Two.

Appendix C

1 But then he rents. He's he got two on with the thing but then he rents some of them Hertz things. When they, you know, when they're very busy he rents them by the day.

2 Well, we'll see what happens. All right, I'll let you know next week, uh, I, I, I'll tell you next week. You'll see some big results.

1 But the uh, the only thing I'd say here is that uh, uh, the man, the man won't, is not going to give an inch, I know now.

2 Yeh.

1 And if it's done wrong now you're not going to do anything but, uh, to, but to tie him up so that he'll lose the fucking—he'll lose everything.

2 So what. Let him lose it. Oh, he's going to know that. He's either going to have to know that he's going to lose it or he's got to pay this money that he owes; that's all.

He owes all this money. I mean the guy took the money and he took it in good faith, and they loaned it to him in good faith, no interest, no nothing.

1 He took a loan. Is that the way it's set up?

2 Yeh.

1 Well—

2 He took this money in, in good faith, as friends and now—

1 You know I got these notes here with, wh—with his signature on it. You want them? The $900 worth of Charlie Brown's notes?

2 Yeh, bring them over, too, bring them over. We'll put, put them all in together here.

1 Yeh, I got them, too.

2 Put them in, too.

1 Well, you see he could turn around and, you know, and say that he had collected the money and was giving it to me and I was giving it to Holzman. He could say,

"For your fucking information that money that you were getting, you know, Tommy, wasn't collecting it. I collected it and I gave it to Tommy, or Dino collected it and he gave it to Tommy—

2 Yeh.

1 —and he gave to you."

2 Yeh.

1 Now he got over about $450 of that money so far, see. See maybe something like that could give a break, you know, 'cause otherwise I'll tell you he's crucifying fucking Bob.

2 Well, that's what he got to put a stop to.

1 He's crucifying Bob. He's got everybody shunning him. Nick shuns him. Te fucking mechanics out there, you know, don't tell him nothing, don't say nothing to him. Nick shuns him. The fucking mechanics out there, You see, naturally with me, he accuses me, too, but I got nothing to do with him, you know, but uh, you know Bob's got to fucking live with him. And you know another thing, I had to give Bob $2,500, he tried to lift, he made loans.

See now to show what a cocksucker this guy is him and Bob made loans, uh, him and Bob made loans to juke boxes totalling $3,000. Then Holzman turned around and didn't put the money in the bank.

2 Humm.

1 You understand?

2 Yeh.

1 So—

2 Well, hello, hello. Hello. Yeh, what happened?

1 Yeh, I pressed this incom button—

2 Oh.

1 —and it went off.

1 And he didn't put the money in the bank, see, and he was going to let the notes bounce.

Appendix C

2 Yeh?

1 You understand? And then he both of them were going to go to court, uh, you know, when the things came up, as the you know issuing the checks with no money in the bank, and he was going to take care of his half. This is what the fucking story was. He was going to take his half as a fifty per-cent partner.

2 Well, I'll tell you.

1 So, the kid's taking an awful fucking, uh, beating, an awful beating, but like I don't want to go and, say to Sally, criticize Sally what he did. You understand?

2 Yeh.

1 But he did do the fucking thing wrong because he said things verbatim to this man that knew they come from Bob, knew it, Dino, believe me. He knew it come right out of his mouth.

2 Well—

1 Now—

2 —Maybe we shouldn't have done it that way and—

1 He knew it come right out of his mouth. That's why he's, that's why he's crucifying this fucking kid now. Now it's all he has to do is if he wants to finish this fucking man in Chicago go down to that fucking National City Bank on 43rd Street and get a copy of them fucking—

2 Chase Manhattan.

1 Chase Manhattan and get a copy of the, you know, you get a photostatic statement.

2 He don't even have to do that, Tom, don't you understand?

1 Well, if he shows him that he won't have to go to nobody else because he'll be fucking finished with the—definitely lose his fucking job.

2 Well—

1 All right, listen, I'll talk it over with you when I see you.

2 Yeh, because he's going all the way with this guy and I don't want, I don't want, I hope I'm hoping this guy just tokenly repays some of that money, you know what I mean, because this way there's no, uh, nothing, no violence or anything, 'cause I know that, I know when this guy made up his mind to do something there's no, uh, there's no more stopping him, 'cause uh, I mean, uh, he went out to Chicago bent on doing something.

And, uh, that's what's going to happen. All right. Listen, maybe I'll see you tomorrow or something—

1 Yeh, I'll be in the city Monday or Tuesday.

2 Yeh, bring something over here so I got my uh, special forces here.

1 Yeh, all right. Let me see if anything comes up. If anything comes up sensible though. It's go to be sensible.

2 Look this is why we're in that daring business, the special forces. We wear the green berets. We do anything risky or non-risky. We got insurance policy floaters we take out.

1 Yeh, all right.

2 All right, I'll see you. So long.

1 Right.

SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

PETER L. F. SABBATINO
233 Broadway
New York, New York 10007
Attorney for Petitioner

HENRY J. BOITEL
New York, New York
Of Counsel

INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Stipulation by the Attorneys for the Petitioner and the Respondent in aid of this Court	7
The application for the wiretap orders	8
The wiretap orders	17
Installation of wiretaps and retrieval of the wiretap information	18
Pretrial proceedings concerning the wiretaps	27
Petitioner is arrested and learns of the electronic surveillance	27
September 2, 1964, motion for inspection of the Grand Jury minutes and dismissal of the indictment	27
November 10, 1965, motion for suppression of the wiretap recordings	28
Trial proceedings concerning the wiretaps	29
Introduction of the wiretap recordings at the trial	31
The Prosecution's characterization of the Petitioner's wiretap conversations as being an absolute, unqualified confession	34
The Defense	36

Page

Summary of Argument 38

ARGUMENT 43

Introduction to Argument 43

POINT I—

The Wiretapping of the Petitioner's Telephone Conversations Was in Direct Violation of the Federal Communications Act (48 Stat. 1064, 1103, 47 U.S.C. 605) and Article VI of the United States Constitution; the Use of Those Conversations as Evidence Against the Petitioner Was Thus in Violation of Organic Law and of the Petitioner's Right to Due Process of Law as Guaranteed by the Federal Fourteenth Amendment and as Specified in the Federal Fourth, Fifth and Ninth Amendments 49

A. Wiretap evidence which is secured in violation of the Federal Communications Act must be excluded in State criminal prosecutions 49

B. The exclusionary rules which pertain to evidence secured in violation of the Federal Communications Act apply to the Petitioner's case and his conviction should be reversed 52

C. The Federal Communications Act brought telephone conversations within the realm of privacy which is protected by the Federal Fourth and Fifth Amendments, and the search for and seizure of such conversations was unreasonable in a constitutional sense by virtue of the absolute prohibitions of the Act 58

Page

D. Insofar as the invasion of privacy involved in wiretapping was not contemplated by the Constitution and the Bill of Rights, the Ninth Amendment should be interpreted so as to prohibit all wiretapping; insofar as wiretapping is a form of testimonial compulsion, the Fifth Amendment should be interpreted so as to prohibit all wiretapping 61

POINT II—

Section 813-a of the New York Code of Criminal Procedure Is Unconstitutional on Its Face as Being Violative of the Federal Fourth and Fourteenth Amendments 63

POINT III—

The Wiretap Order Herein Was Unconstitutional in Its Origins, on Its Face, and in Its Implementation, All of These Being in Violation of the Fourth, Fifth, Ninth and Fourteenth Amendments of the Federal Constitution 67

A. The wiretap order was not based upon the showing of probable cause required for searches generally, nor upon the particular showing of necessity which ought be required in the case of wiretap searches 67

B. The wiretap order authorized an unconstitutional general search of sixty days duration 70

C. The wiretap order did not provide for a return, nor was there in fact a return made 76

D. The broad grant of wiretapping permission in the present case, covering a number of telephones, compounded the unconstitutionality of the search, so as to decisively deprive the wiretapping of any semblance of due process 78

Page

POINT IV—

Since the Wiretapping Herein Constituted a Direct Violation of the Petitioner's Fourth Amendment Right Against Unlawful Searches and Seizures, His Conviction Should Be Reversed 80

POINT V—

The Petitioner Was Denied a Fair Trial in Violation of the Federal Fifth and Fourteenth Amendments by the Prosecutor's Intentional and Repeated References, in His Summation to the Jury, Characterizing the Recorded, Wiretapped, Conversations of the Petitioner as "Confessions"; the Resulting Prejudice Was Compounded Since the Prosecutor, in Effect, Capitalized Upon the Fact That This Court Announced Its Decision in *Miranda* v. *Arizona*, 384 U.S. 436, During the Course of the Petitioner's Trial 81

CONCLUSION 85

APPENDIX A—

Text of the Constitutional and Statutory Provisions Involved A1

APPENDIX B—

Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Chapter 119; 47 U.S.C. 605) B1

APPENDIX C—

New York State Eavesdropping Warrants Law, as signed into law June 5, 1968 (Laws of 1968, Chapter 546; New York Code of Criminal Procedure, Title III) C1

Page

TABLE OF AUTHORITIES CITED

CASES:

Agnello v. *United States*, 269 U.S. 20 (1925) 75
Aguilar v. *Texas*, 378 U.S. 108 (1964) 66
Application for Interception of Telephone Communications, 23 Misc. 2d 543, 198 N.Y.S.2d 572 (1960) 57
Benanti v. *United States*, 355 U.S. 96 (1967) 50, 54, 55, 58
Berger v. *New York*, 388 U.S. 41 (1967) 40, 41, 63, 64, 65, 66, 67, 69, 71, 72, 74, 75, 78
Boyd v. *United States*, 116 U.S. 616 (1886) 62
District of Columbia v. *Little*, 178 F.2d 13 (D.C. Cir., 1949), *aff'd* 339 U.S. 1 60
Elkins v. *United States*, 364 U.S. 206 (1960) 51, 56
Entick v. *Carrington*, 19 How. St. Tr. 1029 (1765) 71
Fahy v. *Connecticut*, 375 U.S. 85 (1963) 73
Goldman v. *United States*, 316 U.S. 129 (1942) .. 74
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 62
In re Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S. 2d 84 (1958) 57
Johnson v. *New Jersey*, 384 U.S. 719 (1966) .. 74
Katz v. *United States*, 389 U.S. 347 (1967) 40, 41, 65, 66, 74, 75, 78
Ker v. *California*, 374 U.S. 23 (1963) 53, 66, 73
Lee v. *Florida*, —— U.S. ——, 88 S.Ct. 2096 (1968) 39, 50, 51, 52, 53, 54, 58, 59
Linkletter v. *Walker*, 381 U.S. 618 (1965) ..42, 53, 54, 80

Page

Mapp v. *Ohio*, 367 U.S. 643 (1961) 39, 42, 51, 52, 53, 54, 55, 56, 57, 58, 80
Marron v. *United States*, 275 U.S. 192 (1927) 71
Miller v. *United States*, 357 U.S. 301 (1958) 57
Miranda v. *Arizona*, 384 U.S. 436 (1966) 42, 57, 81, 82, 84, 85

Nardone v. *United States*, 302 U.S. 379 (1937) .. 59

Olmstead v. *United States*, 277 U.S. 438 (1928) .. 57, 58, 65, 74
Osborn v. *United States*, 385 U.S. 323 (1966) 75

People v. *Dinan*, 11 N.Y.2d 350, 229 N.Y.S.2d 406, 183 N.E.2d 689 (1962) 57
People v. *DiRenzzio*, 19 N.Y.2d 45, 277 N.Y.S. 2d 668 (1966) 74
People v. *Kaiser* (*sub nom. People* v. *Granello*), 48 Misc. 2d 868, 265 N.Y.S.2d 1018 (1965) 2, 29
People v. *Kaiser*, 28 A.D. 2d 647, 282 N.Y.S.2d 207 (1967) 2
People v. *Kaiser*, 21 N.Y. 2d 86, 286 N.Y.S.2d 801, 233 N.E.2d 818 (1967) 1, 65, 66, 72, 76, 77
People v. *McQueen*, 18 N.Y.2d 337, 274 N.Y.S. 2d 886 (1966) 74
People v. *Rensing*, 20 N.Y.2d 936, 286 N.Y.S.2d 481 (1967) 74

Rochin v. *California*, 342 U.S. 165 (1952) 62

Schwartz v. *Texas*, 344 U.S. 199 (1952) 51
Stoner v. *California*, 376 U.S. 483 (1964) 53
Stovall v. *Denno*, 388 U.S. 293 (1967) 74

Townsend v. *Sain*, 372 U.S. 293 (1963) 63

United States v. *Jeffers*, 342 U.S. 48 (1951) 75

Wolf v. *Colorado*, 388 U.S. 25 (1949) 51, 55
Wong Sun v. *United States*, 371 U.S. 471 (1962) 75

Page

UNITED STATES CONSTITUTION:

Article Six, Section Two 3, 4, 49, 55, A1
Fourth Amendment 3, 4, 28, 31, 39, 40, 41, 42, 49, 52, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 75, 79, 80, A1
Fifth Amendment 3, 4, 31, 39, 40, 41, 42, 49, 58, 59, 60, 61, 62, 67, 81, 84, 85, A1
Ninth Amendment 3, 4, 5, 40, 41, 49, 61, 62, 67, A2
Fourteenth Amendment 3, 4, 5, 40, 42, 49, 52, 56, 58, 60, 61, 63, 64, 67, 81, 83, 85, A2

UNITED STATES STATUTES:

Omnibus Crime Control and Safe Streets Act of 1968 ..... 29, B1
18 U.S.C. Chapter 119 (1968) 50, B1
18 U.S.C. 2518 ..... 70, 78
28 U.S.C. 1257(3) (1948) c. 646, 62 Stat. 929 2
47 U.S.C. 605 (1934) c. 652, Title VI, §605, 48 Stat. 1103 ..... 3, 5, 39, 40, 49, 50, 51, 52, 54, 63, 64, 67, 71, 73, 78, A4

NEW YORK STATE CONSTITUTION:

Article I, Section 12 ..... 5, 17, A2

NEW YORK STATE STATUTES:

New York Code of Criminal Procedure, § 813-a, *as amended*, L. 1958, c. 676 ..... 4, 5, 7, 8, 17, 28, 40, 54, 63, 64, 67, 71, 73, 79

New York Code of Criminal Procedure, § 817, *as added*, L. 1968, c. 546 ..... 70, C2

New York Code of Criminal Procedure, § 823, *as added*, L. 1968, c. 546 ..... 78, C5

New York Civil Practice Law and Rules, § 4506, *as amended*, L. 1968, c. 546 ..... 63, C6

Page

New York Penal Law:

§ 530, *as amended*, L. 1882, c. 384, §1 5
§ 580-a, L. 1959, c. 611, §2 5
§ 850, *as amended*, L. 1917, c. 518 5
§ 851, *as amended*, L. 1917, c. 518 5

New York Eavesdropping Warrants Law (L. 1968, c. 546) 63, C1

TEXTS:

Mill, J. S., *On Liberty* (1859) 43
A Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) 45

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER

Opinions Below

The majority opinion of the Court of Appeals of the State of New York is dated December 7, 1967, and is reported at 21 N.Y. 2d 86, 286 N.Y.S. 2d 801, 233 N.E. 2d 818 (A. 305-321).* The dissenting opinion of Chief Judge Stanley Fuld (A. 321-328) is reported at 21 N.Y. 2d 86, 104, 286 N.Y.S. 2d 801, 816, 233 N.E. 2d 818.

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* "A" Refers to the Petitioner's Appendix filed in this Court.

The Appellate Division, Second Department, of the Supreme Court of the State of New York affirmed the Petitioner's convictions without opinion. The "Memorandum" Report of the Affirmance is reported at 28 A.D. 2d 647, 282 N.Y.S. 2d 207. (A. 298.)

Prior to trial the Petitioner moved in the County Court of Nassau County, New York, for an order "declaring unreasonable, illegal and void the interception of telephone communications" in his case and for an order "precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the course of, or as a result of, the said unreasonable, illegal and void interception." Both motions were denied in an opinion which is reported at 48 Misc. 2d 868, 265 N.Y.S. 2d 1018. (A. 56-61.)

Jurisdiction

The order (remittitur) of the Court of Appeals of the State of New York was dated December 7, 1967. (A. 303.) The Petition for a Writ of Certiorari was granted on April 22, 1968. (A. 331.)

The jurisdiction of this Court rests on 28 U.S.C. 1257 (3) since: 1. There is necessarily drawn into question the validity of a State statute (N.Y. Code Crim. Proc. § 813-a) on the ground of its being repugnant to the Constitution and the Laws of the United States, and 2. The Petitioner is claiming rights, privileges and immunities under the Constitution and the Laws of the United States.

Questions Presented

Petitioner was convicted of participating in a conspiratorial attempt to commit the crime of extortion. State prosecutive authorities have stipulated that the indictment and conviction of the Petitioner were completely dependent upon evidence secured by the electronic interception (wiretapping) of a telephone conversation to which the Petitioner was a party. The interceptions and the use of the evidence obtained thereby were without the authorization of either party to the said telephone conversations.

The questions are:

1. Is the secret electronic interception of a telephone conversation (wiretapping) unconstitutional under the Federal Constitution—Supremacy Clause, Fourth, Fifth, Ninth and Fourteenth Amendments—by virtue of the prohibitions contained in the Federal Communications Act (47 U.S.C. 605)?

2. Where a State judicial order authorizes, for sixty days, the secret electronic interception (wiretapping) of all incoming and outgoing telephone conversations on a particular telephone, are such interceptions unconstitutional under the search and seizure standards of the Fourth Amendment, the retained rights provision of the Ninth Amendment, and the due process clause of the Fourteenth Amendment?

3. Where the secret electronic interception of telephone conversations (wiretapping) is conducted pursuant to a State judicial order and the order does not provide for, nor is there in fact, a return made upon the warrant to

the authorizing magistrate, do such interceptions violate the search and seizure standards of the Federal Fourth and Fourteenth Amendments?

4. Where a State statute (N.Y. Code of Criminal Procedure § 813-a) which authorizes the judicial issuance of orders for the secret electronic interception (wiretapping) of telephone conversations is unconstitutional on its face under the Federal Fourth and Fourteenth Amendments, are all judicial orders issued thereunder and all interceptions made pursuant to such orders likewise unconstitutional?

5. Since the Petitioner was convicted solely upon evidence adduced by the use of recorded secret interceptions of telephone conversations to which he was a party, must his conviction be vacated if such interceptions were made in violation of the United States Constitution—Supremacy Clause, Fourth, Fifth, Ninth and Fourteenth Amendments?

6. Where the prosecutor, in the presence of the jury, intentionally and repeatedly refers to recorded wiretapped conversations of the Defendant as being "confessions," when, in fact, they are merely circumstantial evidence, is the Defendant so prejudiced thereby as to deny him a fair trial in violation of the Federal Fourteenth Amendment?

Constitutional Provisions and Statutes Involved

The Federal Constitutional provisions involved are Article Six (Supremacy of the Constitution and Laws of the United States), the Fourth Amendment (privacy, search and seizure), the Fifth Amendment (privacy and

self incrimination), the Ninth Amendment (reserved right of privacy) and the Fourteenth Amendment (abridgement of privileges and immunities and deprivation of liberty without due process of law).

The Federal statute involved is the Federal Communications Act of 1934, 48 Stat. 1064, 1103, 47 U.S.C. 605 (prohibition against the interception of any telephone communication).

The New York State Constitutional provision involved is Article One, Section Twelve (searches and seizures, and interception of telephone communications).

The New York State statute involved is the New York Code of Criminal Procedure § 813-a (authorization for *ex parte*, judicial orders for wiretapping).

The aforesaid Constitutional and statutory provisions are quoted in Appendix A hereto, *infra*.

The State statutes upon which the Petitioner was convicted are New York Penal Law: § 580-a (conspiracy), § 850 and § 851 (attempted extortion) and § 530 (coercion). These statutory provisions are not printed herein because no issue relating thereto is raised by the Petitioner.

Statement of the Case

On July 16, 1964, the Petitioner was indicted in the County Court of Nassau County, New York, together with two other named defendants—Salvatore Granello (also known as Sally Burns) and Dino Conte (also known as Dino Harris). In addition, there were four unnamed defendants who were unknown to the Grand Jury and were thus identified fictitiously in the indictment.

The indictment (A. 1-8)* was in six counts** and, in essence, charged a conspiratorial attempt to extort $25,000.00 and twenty five per cent of the profits of his coin machine business from one Irving Holtzman. The conspiracy was alleged to have existed during the period from May 1, 1964 to July 15, 1964 (A. 2).

The Petitioner entered a plea of not guilty to the indictment; his case was severed from that of the other defendants; he was tried alone and was found guilty upon three of the six counts charged: Conspiracy (to extort); Attempted Extortion and Coercion. (A. 265.)

The theory of the prosecution's case against the Petitioner was that two of the co-conspirators, Granello and Conte, devised and put into effect a plan to perpetrate the extortion upon Holtzman.

The Petitioner had had a business relationship with Holtzman and thus had access to some information concerning Holtzman's financial position. It was alleged that

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* "A" preceding a page number is used in this brief to denote a reference to the Petitioner's Appendix in this Court. "R" preceding a page number is used in this brief to denote a reference to the typewritten transcript of the trial.

** The crimes charged in the indictment are as follows:— First Count: Conspiracy (A. 1); Second Count: Attempted Extortion (A. 4); Third Count: Coercion (A. 3); Fourth Count: Assault in the Second Degree (with a dangerous weapon) (A. 6); Fifth Count: Assault in the Second Degree (with intent to commit a felony) (A. 6); Sixth Count: Burglary in the Second Degree (A. 7). Counts four, five and six relate to an incident where four unknown men went to the Holtzman house and one of them pushed his way into the house, assaulted Mrs. Holtzman and brandished a gun. No further connection was shown between these acts and the conspiracy other than the fact that the incident occurred during the alleged time period of the conspiracy. The Petitioner was acquitted of these three counts. (A. 265.)

the Petitioner had conveyed this information to Granello and Conte with full awareness of the purpose for which it would be used, i.e., to facilitate the extortion attempt. (A. 238.) The only evidence of the Petitioner's alleged involvement in the conspiracy was in the form of two wiretap recordings of telephone conversations between the Petitioner and Conte. The origin and use of these recordings are discussed fully in this statement of facts.

Stipulation by the Attorneys for the Petitioner and the Respondent in Aid of This Court

The attorneys for the Petitioner and the Attorneys for the Respondent have, in aid of this Court, entered into the following stipulation concerning the wiretaps of the Petitioner's conversations:

"In aid of the Court, the attorneys for the Petitioner and the attorney for Respondent enter into the following stipulation concerning the factual background of the Petitioner's conviction:

"The indictment and conviction of the Petitioner were completely dependent upon evidence secured by the State of New York by means of the electronic interception of telephone conversations to which the Petitioner was a party. The interceptions in question and the use of the evidence obtained thereby were without the authorization of either party to the said telephone conversations. The interceptions were made pursuant to an *ex parte* order issued by a County Court Judge of the State of New York under the authority of § 813-a of the New York State Code of Criminal Procedure. Independent of the evidence so obtained, the People of

the State of New York were possessed of nothing which implicated or tended to implicate the defendant in the crimes charged."

The original signed stipulation is on file with the clerk of this Court. This dependence was also conceded by the prosecution at the trial (A. 62-63) and upon the appeals in the courts below.

The Application for the Wiretap Orders

During the course of the investigation in the present case, various types of electronic surveillance were used by the police and the district attorney. With his permission, Holtzman's home telephones were tapped (R. 290), his office was "bugged" (R. 290), and two telephone calls which he made to Granello from a pharmacy were tapped (R. 290).

Aside from the above, there were at least four telephones which were tapped: one telephone at the Headliner Bar, discussed below; two telephones at Patrissy's Restaurant, discussed below; and a telephone listed to one Audrey Graziano. The Graziano tap and the unsuccessful efforts of Petitioner's trial counsel to learn about any additional taps, are discussed *infra* at page 19.

By written petitions, dated June 30, 1964, an assistant district attorney of Nassau County, Norman Levy, applied to a judge of the County Court for orders, pursuant to section 813-a of the New York Code of Criminal Procedure, to tap three telephones.

The first petition (A. 17) was for permission to tap the telephone located at the Headline Bar in the Times Square

area of Manhattan. This tap later produced two telephone conversations which were used in evidence at the trial of the Petitioner and which were the only evidence alleged to connect the Petitioner with the crimes charged.

The second petition* was for permission to tap two public telephones which were located at Patrissy's Restaurant in lower Manhattan.

Both of the above petitions were forms, with the blanks appropriately filled in, and alleged that Mr. Levy was then engaged in the investigation of crimes committed in violation of the Penal Law of the State of New York, particularly Attempted Extortion, Conspiracy to Commit the Crime of Extortion and Conspiracy to Commit a Crime. The petitions stated that, in connection with the above investigation, Mr. Levy was conducting an investigation of the criminal activities of Salvatore Granello, Dino Conte and other unknown persons,

> "who, your petitioner is informed and believes, have been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as participants or as material witnesses, have knowledge or information regarding said crime and are in communication by telephone with other persons having such knowledge and information." (A. 17-18.)

The petitions then go on to allege that the telephone in question (in the one case at the Headline Bar and in the other case at Patrissy's Restaurant) is believed to be "the means of carrying on and promoting criminal activities"

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* This second petition is not reproduced in our Appendix due to the inability of the County Clerk of Nassau County to locate it. If it is located, it will be submitted to the Court separately.

by the persons in question, and it is believed "that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument. . . ." (A. 18.) The petitions requested permission "to intercept and record all telephone communications made by and to the said Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls over said telephone(s) . . . from the date of making such order, up, to and including the 29th day of August, 1964." (A. 18.)

Upon being presented with the above petitions, Judge Spitzer of the County Court, held an *ex parte* hearing in chambers. Aside from Mr. Levy, the only other person present was a confidential stenographer who made a stenographic record of the proceeding. (A. 83.) The hearing minutes are reproduced at A. 20-40.

Mr. Levy was sworn and commenced to relate the information upon which he sought the orders. The chronology of events, as related by Mr. Levy, was as follows:

On June 4, 1964, Dino Conte visited Holtzman's office and indicated that he had been sent by Granello and that Granello was upset that Holtzman had been using Granello's name for the purpose of securing coin machine locations. Holtzman denied having personally used Granello's name, but admitted that one of his employees had done so without authorization. Granello called Holtzman later that day, and they arranged to have lunch at Holtzman's office on the following day. Granello failed to appear for the luncheon appointment. (A. 21-24.)

On June 8, 1964, Holtzman left his home in Roslyn, New York for his Manhattan office at 7:40 A.M. Approximately

five minutes later, a man, claiming to be from the United Parcel Service, rang the doorbell of Holtzman's home, and his wife, Ruth Holtzman, answered the door. When she opened the door, the man shoved her backward and she fell to the floor. The man put his hand over her mouth and asked her "Where is your husband?" She then screamed and struggled with the man, grabbing his eyeglasses. The man pulled a gun, and three other men, who had been waiting outside, informed him that the neighbors would call the police and that they had better leave. The four men then left in an automobile.* (A. 24-25.)

When Holtzman arrived at his office that day, he was notified of the above incident and returned home. At home, Holtzman received a message to call Granello at a certain number. (The number in question was the number which was later tapped at the Headline Bar.) Holtzman called the above number and asked for Granello who came on and told Holtzman to go to an outside telephone and call him again. Holtzman did so and asked Granello if he knew what had happened to Mrs. Holtzman. Granello replied that he knew all about it and would like to meet Holtzman at the Charles Restaurant in Manhattan so that they could talk about what had happened to Mrs. Holtzman. (A. 25-26.)

Holtzman went to the Charles Restaurant and spoke with Granello. During the conversation, Granello told Holtzman

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* As noted above at page 6, this attack upon Mrs. Holtzman formed the basis for three counts of the indictment. The assailants were never identified. At the trial, Mrs. Holtzman testified that she did not recognize any of the men, and that the Petitioner, Granello and Conte were *not* among the assailants. (A. 220.) The Petitioner was acquitted by the jury on the charges which grew out of this attack.

that he had heard about the attack, and that it would not have occurred had they met during the prior week. Granello is alleged to have then made the following statements:

• • • • •

"The people I'm with are animals. They couldn't wait till I came home."

• • • • •

"Even Costello had to give up a piece."

• • • • •

"Now with you the family wants $25,000.00 in cash and I want you to give it to them."

• • • • •

"I would never mention the word 'family' but with you I have no worries and I want 25 per cent of what you have—not what your partners have—just you."

• • • • •

"If at the end of the week you have $1.00 left I take 25 cents and you keep 75 cents."

Holtzman told Granello that he would have to think about it. They arranged to meet at the same restaurant on the following day, June 9, 1964. (A. 26-27.)

That evening, Holtzman notified law enforcement authorities of the meeting he had had with Granello. He also told them that as he was leaving the meeting, he saw Dino Conte at the bar of the Charles Restaurant. (A. 27-28.)

On June 9, 1964, in the presence of Assistant District Attorney Levy, Holtzman called the Charles Restaurant and asked Granello, if he, Holtzman, should go to another

telephone and call again. Granello said he should. Holtzman went to a pharmacy and again called Granello at the Charles Restaurant in the presence of Levy and various police officers. The telephone call was monitored and recorded by the police with the permission of the owner of the pharmacy and of Mr. Holtzman. In the conversation, Holtzman referred to the prior day's conversation and told Granello that he did not have any method of raising $25,000.00 for the family and he thought it should be reduced. Granello said that the figure could not be changed, but that he would try to work something out. He denied responsibility for the attack on Holtzman's wife, and blamed it on outsiders. It was then arranged for Holtzman to call Granello on the following day at 10:00 A.M. for the purpose of confirming a noon meeting at Charles Restaurant. Granello gave Holtzman his home telephone number to call. He also said that if Holtzman wanted to call him on that evening, he planned to be at home or at Patrissy's Restaurant (CA 6-8509) or at the LW number which had been called on an earlier date (The Headline Bar). (A. 28-33.)

On June 10, 1964, Holtzman called Granello at his home and told him he would call him again at the Charles Restaurant at 12 noon.* Holtzman did not make the noon call, and, later that afternoon, he received a telephone call from Dino Conte who said that Granello was waiting for Holtzman to call. Conte told Holtzman that Granello had left the Charles Restaurant, but could now be reached at the Headline Club. Holtzman called the Headline Club

* This telephone conversation and all those subsequently described were tapped and recorded but this is not revealed in Mr. Levy's testimony before Judge Spitzer. (*See* R. 471-490.)

(Headline Bar) and spoke to Granello. He explained that he had not called earlier due to the fact that the District Attorney had posted a man at his house. They agreed to meet for a discussion within a few days. (A. 33-35.)

On June 15, 1964, as the result of a telephone call from Holtzman, Granello met with Holtzman at Holtzman's office and gave Holtzman the telephone number of his summer home. (A. 35.)

On June 23, 1964, Granello again met with Holtzman at Holtzman's office. He asked Holtzman for $12,500.00 for the family and told him that "If you don't want to make a deal with them I'll bow out." Holtzman said he would let Granello know by Friday or Monday. (A. 35.)

Assistant District Attorney Levy later learned that on this same day, one Joseph Albino received a telephone call from Rocky Graziano, the prize fighter. Albino was at that time a business associate of Holtzman, and Graziano was Albino's cousin. Graziano told Albino "I understand your partner Irv (Holtzman) and you are having a little trouble. I can't talk to you on the phone. Can you read between the lines? Can I come up to see you?" (A. 36.)

On June 26, 1964, Dino Conte called Holtzman's office and left word that Holtzman had made an appointment and didn't keep it and "that is no way to act." (A. 35.)

On June 28, 1964, Graziano visited Albino and told him that he had been sitting at a table with certain persons and these persons were "talking rough. They said they were going to hurt your partner, Irv, and you." Graziano said he told these persons not to hurt Albino. He asked Albino what the problem was and Albino told him about Granello's demands. Graziano advised Albino not to take

sides, to stay neutral, not to worry and that he would not get hurt. Graziano further said "The guys want an answer. Tell him the guys are waiting for an answer." (A. 36-37.)

On June 29, 1964, "Holtzman called Granello and told him that he was not going to give any money to the family and was not going to give Granello any part of his business." Granello responded "Okay, buddy, I'm bowing out. Now you're on your own." (A. 35.)

On June 30, 1964, Dolores Billing, Holtzman's married and pregnant daughter received a telephone call from an unidentified person warning her that if her father didn't cooperate, she would be assaulted. The caller is not alleged to have given any indication concerning with whom her father was supposed to cooperate or what the subject matter of the cooperation was. (A. 35-36.)

On June 30, 1964, certain Nassau County police officers saw Granello use two public telephones in Patrissy's Restaurant. The telephone numbers were CA 6-8509 and CA 6-8854. (A. 37-38.)

These are two of the telephones for which a wiretap order was sought and obtained by Assistant District Attorney Levy. (A. 41, 43.)

This is also the date that appears on the wiretap petitions which were presented on the following day to Judge Spitzer of the County Court by Mr. Levy. (A. 19.)

On July 1, 1964, Judge Spitzer held the *ex parte* hearing which produced the above testimony of Mr. Levy. At the end of Mr. Levy's testimony, the following colloquy occurred:

"Mr. Levy: . . . The basis of the People's application, your Honor, is the affidavit by Norman J. Levy that is before you and the sworn testimony of Norman J. Levy which you have heard.

"The Court: Mr. Levy have you been trying to verify whether the daughter of Holtzman was in fact threatened?

"Mr. Levy: Your Honor, Detective John Skuzenski of the Nassau County Police Department assigned to the District Attorney's Squad interviewed Mrs. Dolores Billing at her home on Sylvia Lane yesterday and the facts that I have testified to before your Honor were stated to Detective Skuzenski by Mrs. Billing.

"The District Attorney's office and the Nassau County Police Department are working on an investigation to identify the caller.

"The Court: At the present time have you been able to get any clue which would lead you definitely to the caller?

"Mr. Levy: We have not, your Honor.

"The Court: You feel as though this tap will assist you in that quest?

"Mr. Levy: Yes, your Honor.

"The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

"Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holtzman, in regard to the demand for $25,000.00 and 25 per cent of his business.

"The Court: So that in addition to the alleged extortion you are faced here with the threats of violence and physical harm to innocent people?

"Mr. Levy: Yes, your Honor, and the investigation regarding the assault of Mrs. Ruth Holtzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billing.

"The Court: I am satisfied that there is reasonable ground for granting your application." (A. 39-40.)

The Wiretap Orders

Upon the Assistant District Attorney's petition and testimony discussed above, Judge Spitzer issued two form orders with the blanks appropriately filled in for the different telephones in question. (A. 41-42, 43-44.)

Each of the orders recited that "there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over [the] telephone . . ." The orders provided that pursuant to Article I, Section 12 of the New York Constitution and Section 813-a of the New York Code of Criminal Procedure, the District Attorney, the assistant district attorney and any and all persons employed or assigned to their control or direction:

"hereby are authorized and empowered to intercept and record all telephone communications made by and to Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls . . ."

over the three telephones in question. The orders both provided for an effective period of sixty days, July 1, 1964 to August 29, 1964. (A. 42, 44.)

Installation of Wiretaps and Retrieval of the Wiretap Information

The following information concerning the installation and use of the known* wiretaps is taken from testimony given by Prosecution witnesses at the trial of the Petitioner.

John Donovan (A. 115-135), an internal auditor of the New York Telephone Company, testified that the subscriber of telephone number LW 4-2523 was the Headline Bar, a restaurant. The telephone had one extension, two portable phones and two jacks. (A. 116.) He said that the two telephone numbers at Patrissy's Restaurant were for coin machine telephones. (A. 120.)

Donovan explained the technical aspects of tapping a telephone wire (e.g., A. 117-119) and said that the terminal box for the telephone at the Headline Bar was located in the basement of a certain building. If one went to that box, identified the wires that the particular telephone was working on, and attached a tape recorder or a listening device to those wires, all conversation going into and out of the telephone would be recorded. Additionally, the device would pick up the dial tone and the ringing of the telephone before it was answered. (A. 120.)

Upon cross examination, Donovan testified that information concerning the proper wires to tap is provided to the

* As revealed below, at page 19, the Defense was not permitted to ascertain whether there were additional wiretaps used in the investigation of this case. It is respectfully urged that this Court direct the Respondent to reveal the nature and extent of any additional wiretapping and "bugging" which may have been taken place. A motion by the Petitioner requesting, among other things, that such an order issue, will be filed with this Court.

police department "under a subpoena and under no other condition." (A. 123.) (To the same effect, see A. 134.)

Donovan, on cross examination, revealed that he had testified in the grand jury in the present case about additional telephone taps other than those already mentioned. Defense counsel asked him if he recalled the additional taps. The question was objected to and a recess was called. (A. 126.) In the absence of the jury, defense counsel noted to the Court that the grand jury testimony of the witness revealed that a telephone line listed to one Audrey Graziano had also been tapped and that the defense wished to inquire as to additional wiretaps. (A. 128.) The request was denied by the Court with the following statement:

> " . . . we have a duty to protect people and I am not going to question the credibility to allow into this evidence of possible taps on other phones which may raise an inference by some publication in the newspaper that there might have been some implication of a person who is absolutely innocent, has nothing to do with this case, and by inference or some note in some paper, and I am not going to do that." (A. 128.)

William J. Beach (A. 136-143), a detective of the Nassau County Police Department, testified that he had been attached to the District Attorney's Rackets Bureau since 1958 and his "duties were primarily in the wiretapping field." (A. 136.) Prior to installing the tap in the present case, he had installed tapping devices "on many occasions, pursuant to a court order. . . ." (A. 139.)

On July 3, 1964, pursuant to a Court order and by means of information obtained from the New York Tele-

phone Company, he installed a recording device tapping the wires of the Headline Bar. The installation, securing and testing of the equipment involved took about thirty to forty-five minutes. (A. 141.) Beach described the operation of the equipment as follows:

> "The minute that the telephone is picked up from the cradle, the telephone receiver, the machine automatically starts and all during the time it will record every conversation, either incoming or outgoing, over that telephone, and when it's set down in the cradle the machine stops and it lays dormant until it's picked up." (A. 138.)

Clifford Crawford (A. 143-149), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's racket squad and had "been doing the wiretaps for the past five years for the Nassau County District Attorney's Office", and had much practical experience in the field. (A. 143.)

On July 3, 1965, Crawford installed a wiretap, connected to an automatic recording device, upon the line leading to telephone number CA 6-8854 at Patrissy's Restaurant. He did this pursuant to a court order. (A. 145.) He checked to determine whether he had tapped into the correct line by listening in and hearing someone answer the phone with the statement "Patrissy's Restaurant." (A. 145.)

On cross examination, when asked the approximate number of reels of tape which were used during the entire investigation of the case, to his knowledge, Crawford responded as follows:

"A. I would say over a hundred, maybe more, maybe two hundred; more. Honestly, I have never sat down and actually counted the tapes that were placed on it." (A. 148.)*

John Skuzenski (A. 149-156), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's Racket Squad, and on July 3, 1964, he accompanied Detective Beach (page 19, *supra*) when Beach installed the wiretap on the telephone of the Headline Bar. (A. 149.) Skuzenski placed a fresh reel of tape on the wiretap recorder, and he identified that reel of tape as being People's Exhibit 9. (A. 149-150.) He said that the tape recorder was then locked in a room, the lock being one which he had purchased at a hardware store. The two keys to the lock were given by him to a Detective Costello. (A. 154-155.)

On cross examination, he said that an unauthorized person could tamper with the machine and remove and replace the reel of tape on the machine by breaking into the locked room, during the period that the automatic machine was unattended. Such replacement could easily be done by a layman, and there was nothing particularly complicated about it. (A. 152-154.)

Thomas Costello (A. 156-167), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's Rackets Bureau, and on July 4, 1964 he went to the location of the Headline Bar wiretap

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* Crawford also installed, with Holtzman's consent, taps on Holtzman's home telephones, taps on a pharmacy telephone which Holtzman twice used to call Granello, and a bug in Holtzman's Manhattan's office. (R. 290.)

with two keys that he had received from Detective Skuzenski. He entered the room in which the recording device was secured, checked the device to see if it was working properly, and saw that the tape did not have to be changed. He secured the room and left. He returned to the room again on July 5, 1964, removed People's Exhibit 9 from the machine and replaced it with another reel of tape. The District Attorney's Office was closed on that day, and so, he brought People's Exhibit 9 home with him. (A. 156-158.) On July 6, 1964, he turned People's Exhibit 9 and the keys to the room over to a Sergeant Tozzi. (A. 158.)

About September 11, 1964, Costello obtained Exhibit 9, together with various other tapes (People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 10), from Sergeant Tozzi and gave them to Donald J. White, Confidential Reporter of the District Attorney's Office. On September 28, 1964, White returned these tapes to Costello, together with transcripts of the conversations that were on the tapes. Exhibits 1 through 10 were then returned to Sergeant Tozzi. (A. 159-161.)

On cross examination, the following exchange took place:

"Q. Now, will you tell us, Detective Costello, how many reels were removed from the tap on the Headliner Bar?

A. I have no idea.

Q. Could you hazard a guess?

A. It would be very hard to say.

Q. Would you say one hundred?

A. I doubt if it would be one hundred.

Q. Certainly over fifty?

A. No, it's probably less than fifty.

Q. Would you say it was more than thirty-five?

A. If I was to guess, I'd say maybe ten or fifteen.

Q. Ten or Fifteen from the Headline Bar?

A. And that would be strictly a guess.

Q. Would you know where those reels are now, Detective?

A. No, I have no idea where they are.

Q. Well, let me ask you detective: Would the reel be discarded if in the opinion of the detective who listened to it it contained nothing valuable?

A. No. When we work on a case, an investigation, all the reels are kept.

Q. No matter how innocuous they may appear?

A. That's correct.

Q. So that this ten or fifteen reels from the Headliner Bar are not in the custody of the District Attorney's Office?

A. They could very well be.

Q. Well, is there any doubt in your mind, detective?

A. No.

Q. That they are in the custody of the District Attorney, and could be produced if it was necessary?

A. Yes.

Q. Now, we have discussed Holtzman's home and we have discussed the phone booth and the Headliner Bar. Now, was there any other place where a tap with recording devices was set up?

A. I know there was one set up on Patrissy's Restaurant.

Q. Did you have something to do with the setting up of that tape?

A. No, I had nothing to do with setting up any taps.

Q. Could you do this, Detective: Could you estimate the number of reels that might have been taken from the taps set up at Patrissy's Restaurant?

A. I have no idea.

Q. Would you say again it might be something like ten or fifteen as of the Headline?

A. Could be; could be less, could be more. I have no records to indicate exactly how many taps were taken of any tap.

Q. And, again, of course, whether they were innocuous or not, they would now be in the custody of the District Attorney's office?

A. That is our policy, to hold on to those taps until such time as the case is disposed of.

Q. And there is no reason in this particular case to vary that policy?

A. No.

Q. Now, do you know of any other place, Detective Costello, where a tap and recording device was set up?

A. Not to my knowledge. I have no other idea of any other places they might have been tapped. I have nothing to do with them if they were." (A. 163-165.)

Frank Vedder (A. 167-172), a detective of the Nassau County Police Department, testified that he had been assigned to the Rackets Bureau of the District Attorney's Office for five years, and at some point between July 5, 1964 and September, 1964, at the request of Assistant District Attorney Levy, he listened to People's Exhibit 9 (a reel of tape from the Headline Bar tap). He knew that Detective Skuzenski and Detective Costello also listened to the tape. (A. 167-168.)

Harry Minett, a detective of the Nassau County Police Department, testified that he was assigned to the District Attorney's Racket Bureau and there came a time (date unspecified) when he removed a tape (People's Exhibit 10) from the wiretap recorder which had been installed on the telephone line of Patrissy's Restaurant. He replaced it with another tape. (R. 375-377.)

Frank Abromowitz, a detective of the Nassau County Police Department, testified that from June through September of 1964, he was attached to the District Attorney's Racket Bureau, and there came a time (date unspecified) when he listened and made notes concerning People's Exhibit 8 (from the wiretap of Patrissy's Restaurant) (R. 388-389).

Donald J. White (R. 172-186), a Confidential Reporter for the District Attorney of Nassau County, testified that on September 11, 1964, he was given ten reels of tape, identified as People's Exhibits 1 through 10, and he transcribed only those conversations which appeared on these tapes at certain designated meter readings. (A. 173.) He then put his transcriptions on stencils and made multiple copies of them. Prior to hearing the tapes, he had never before heard the voices of the persons whose voices had been recorded. His transcriptions differentiated between the different voices on the tapes by assigning each voice a number; thus, the first voice was designated "1" and the second voice was designated "2".* (A. 174-176.)

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* At the trial, copies of Mr. White's typewritten transcriptions were marked in evidence and given to the jury. (A. 230, 232.) The numerical designation given to the transcriptions followed that given to the reels of tape from which the transcriptions came. Thus, if two different conversations were transcribed from the reel of tape marked Exhibit 1, the transcriptions bore the

Joseph Tozzi (A. 186-195), a Sergeant of the Nassau County Police Department, testified that he was the commanding officer of the Nassau County District Attorney's Rackets Bureau. He had nine detectives and two patrolmen under his jurisdiction. One of his functions was to act as custodian of the various tape recordings. When an individual tape was not in the custody of one of the police officers in his squad, it would be in Tozzi's custody. (A. 186-187.) He also was the custodian of the District Attorney's wiretap equipment. (A. 190.) He would assign the tapes to various detectives for the purpose of monitoring and making notes concerning the contents of the tapes. (A. 191.) He was not able to estimate, nor would his records reveal, the total number of reels of tape which had been used in this investigation. (A. 191-192.) In order to obtain that figure, he would have to examine the last reel and ascertain the number which was on it. (A. 192.) He knew that every reel of tape in the investigation had been monitored. (A. 192.) He was not sure, but he estimated that four or five of his men had come to him to obtain the reels at various times. (A. 192-193.) No record was kept as to how many times a particular reel was requested for monitoring, nor was a record kept as to when a particular reel was out or who had it. He relied upon his memory in these matters. (A. 193.) He could not say how many recording machines had been requisitioned from his office during the investigation in this case, and he did not have with him the records which would reveal the number of tapping setups which had been used. (A. 194-195.) If a tape had been spliced,

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exhibit designations of "1-A" and "1-B" respectively. (A. 175-176.) The transcriptions of the Petitioner's two wiretapped conversations on the telephone of the Headline Bar, are reproduced in the Petitioner's Appendix, pages 269-296.

he could tell it, but if it had been spliced and played onto a new tape, it would be "very difficult for him to tell that there had been a splice." (A. 195.)

Pre-Trial Proceedings Concerning the Wiretaps

(a). *Petitioner is arrested and learns of electronic surveillance.*

At about 9:00 A. M. on July 15, 1964, the Petitioner was asked to come to the District Attorney's Office for questioning. He did so. (R. 1920.) He was questioned over a period extending until 7:30 P. M. that evening, at which time he was formally placed under arrest. (R. 1923-1924.) The thrust of the questioning appeared to be aimed at getting the Petitioner to sign a statement to the effect that he knew that Granello was demanding $25,000.00 from Holtzman. (R. 1924.) Tapes of conversations between Granello and Holtzman were played for the Petitioner. (R. 1924.) It was thus that the Petitioner first learned of the presence of electronic surveillance in the case. The Petitioner, together with Granello, Conte and four unknown persons, was indicted and arraigned on the following day. (A. 7, 9.)

(b) *September 2, 1964 Motion for inspection of the grand jury minutes and dismissal of the indictment.* (A. 45.)

By a Notice of Motion dated August 24, 1964, the Petitioner moved in the County Court of Nassau County for inspection of the grand jury minutes and for an Order dismissing the indictment. (A. 45.) In his supporting affidavit, the Petitioner's attorney recited that:

> "On information and belief, the evidence which was submitted to the Grand Jury was illegal and improper, and none but legal evidence should have been submitted.

Telephonic interceptions, being illegal, should not have been submitted to the Grand Jury as it was obtained as the result of unreasonable search and seizure, without the permission of the person affected. On information and belief, if any telephonic interceptions which were made, were not made pursuant to Section 813-a of the Code of Criminal Procedure, and if such telephonic communications were made pursuant to an order to wiretap, then such interception and Section 813-a are in violation of the Fourth Amendment. Telephonic interceptions or any wire tap evidence which were submitted to the Grand Jury, did not have any corroboration of identifying witnesses who could identify the voice of the defendant, Thomas Kaiser, with that on the alleged telephonic interception." (A. 47-48.)

The above motion was denied by the Court on the ground that the evidence submitted to the Grand Jury was sufficient to sustain the indictment. (A. 49.)

(c). *November 10, 1965, Motion for suppression of the wiretap recordings.* (A. 50.)

On November 10, 1965, there came on to be heard in the County Court of Nassau County a motion by the Petitioner for orders:

"... declaring unreasonable, illegal and void the interceptions of telephone communications ..."

in his case, and

"precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the courses of, or as a result of the

said unreasonable, illegal and void interception." (A. 50.)

This motion also requested a hearing upon the foregoing matters. (A. 50-51.)

Each of the above requests was denied in an opinion, dated December 13, 1965, by Judge Dowsey of the County Court. Denial was not on the merits, but rather on the ground that no statutory authority existed for such a pre-trial review in relation to wiretap evidence. Judge Dowsey's opinion is reported at 48 Misc. 2d 868, 265 N.Y.S. 2d 1018. (A. 56-61.)

Trial Proceedings Concerning the Wiretaps

On May 31, 1966, the Petitioner's case was called to trial before the Hon. Albert A. Oppido, a Judge of the County Court of Nassau County, and a jury.*

Before the selection of the jury, the Petitioner moved for a hearing to determine the admissibility of the wiretap evidence against him. (A. 62.) The court held that the Petitioner had standing to contest the validity of the wiretaps and granted the motion for a hearing. (A. 68-70.) The minutes of the hearing appear at A. 70-97.

At the hearing, the Court stated that the purpose of the hearing would be to determine "*de novo* whether or not there exists reasonable cause for the issuance of the two wiretap orders; more specifically as to two telephone numbers." (A. 71.) The telephone numbers in question were specified as being the one from the Headline Club

* The case had previously been called to trial before a different judge, and twelve jurors were sworn, but the proceeding was discontinued due to a medical indisposition of the judge. (A. 12.)

and the two from Patrissy's Restaurant. (A. 71.) The Court received in evidence the two court orders which had been issued by Judge Spitzer on July 1, 1964, together with the accompanying petitions of Mr. Levy. (A. 75-76.) (The orders and Headline petition are reproduced in the Petitioner's Appendix at pages 17, 41-44.) Donald J. White, the district attorney's confidential reporter, testified as to his recording and transcribing of Mr. Levy's testimony before Judge Spitzer. (A. 78-83.) He said that the transcription included everything that was said between Judge Spitzer and Mr. Levy. (A. 81.) The transcription was then received in evidence (for the purpose of the hearing) by the Court (A. 83), and the People rested.

The Petitioner then pressed his motion for suppression of the wiretap recordings, specifying *inter alia* the following grounds:

1. Mr. Levy's Petition was legally insufficient (A. 84) in that there was no factual statement by Mr. Levy as to his informer's reliability, the informer (Holtzman) having been a convicted felon; Mr. Levy's testimony was unsubstantiated hearsay; and, there was no factual evidence showing that a crime was being committed or that a wiretap order would reveal evidence as to that particular crime. (A. 84-85.)

2. Even if the orders in question were properly issued, they were clearly inapplicable as far as the Petitioner Kaiser was concerned since he was not named in them. In short, the securing of his telephone conversation was the result of a fishing expedition that just happened to pick up his call. (A. 86.)

3. All wiretaps are violative of the Fourth and Fifth Amendments of the United States Constitution. (At this point, the Court requested that counsel not get into that area, since the point of view represented by this argument was held only by a minority of the State Court of Appeals.) (A. 86-87.)

The Court held that if the wiretap order had been based only on the affidavit of Mr. Levy, "there is no question that (the wiretaps obtained pursuant to the order) would be inadmissible." (A. 88.) The prosecutor concurred in that opinion. (A. 91.) However, the Court held that Mr. Levy's oral testimony before the issuing judge provided the necessary factual material. (A. 88.) The Court ultimately found that there was reasonable ground for the granting of the wiretap orders in both cases. (A. 97.) During the course of the hearing, the Court noted that he personally agreed with the minority view that "wiretaps *per se* shouldn't be allowed in because it is violative of the Fourth Amendment", but he found himself bound by prior decisions. (A. 94.) An exception was taken by the defense to the ruling of the Court. (A. 98.)

Introduction of the Wiretap Recordings at the Trial

After both sides had opened to the jury at the trial, there were marked for identification the various reels of the tape which contained those conversations which the People sought to introduce into evidence. They were marked as People's Exhibits 1 through 10 for identification. (A. 111-113.)

The two wiretapped telephone conversations in which the Petitioner participated appeared on the reel marked People's Exhibit 9. (A. 197-198.) The concersation which had been taken from the wiretap at Patrissy's Restaurant

(in which the Petitioner did not participate) was on the reel marked People's Exhibit 10. (A. 196.)

There were next marked the orders which had authorized the wiretapping at the Headline Bar and at Patrissy's Restaurant. These were marked People's Exhibits 11 and 12 respectively. (A. 113-115.)

The People then called to the stand those persons who had been involved in the installation of the various surveillance devices, and the securing, checking and transcribing of the conversations which had been seized. This testimony, as it relates to the Court ordered wiretaps, is summarized at pages 18-27, *supra*. The typewritten transcriptions of those conversations which the People sought to introduce into evidence were each marked for identification and given a numerical designation which corresponded to the numerical designation which had been given to the tapes from which they had been transcribed. (A. 174-176.) Thus, the Petitioner's two wiretapped conversations were marked, respectively, People's Exhibits 9-A and 9-B for Identification. (A. 175, 176.) The transcription of the wiretap from Patrissy's Bar was marked People's Exhibit 10-A for Identification. (A. 176.)

The judge then held a hearing, outside of the presence of the jury, for the purpose of listening to those conversations which the prosecution sought to introduce into evidence. (A. 195-219.) The Patrissy's Restaurant tap (Exhibit 10) was played at A. 196. The taps from the Headline Bar were played at A. 197-198.

During the course of the hearing, the Prosecutor urged that the jury be provided with the typewritten transcripts of the conversations on the ground that parts of the tapes

would have to be played a number of times to be understandable. (A. 202.)

The Court found that the transcripts clearly reflected the content of the recorded conversations and that the recordings were clear, identifiable in tone and substance. (A. 211.) The Petitioner objected to the admission of all the tape recorded conversations on the ground that they did not reveal a conspiracy in which the Petitioner took part (A. 212), that the taps were taken after the termination of any conspiracy (A. 213-214), that the jury would not be able to follow the court's charge concerning the interpretation of the taps (A. 215-216), and that the tapes included meaningless material which went "nowhere and" had "no probative force." (A. 218-219.)

Irving Holtzman was called to testify in behalf of the People. Out of the hearing of the Jury, he was called upon to identify the voices which appeared on the various tapes which had been marked for identification. (A. 222-227.) He identified the voices in the two conversations of People's Exhibit 9 as being those of Thomas Kaiser (the Petitioner) and Dino Conte. (A. 223-227.)* He identified the voices in the conversations of People's Exhibit 10 as being those of Rocky Graziano and Sally Burns (Granello). (R. 1104-1107.) The jury was then called in and Holtzman identified the participants in the various conversations again, in the presence of the jury. As he went through the identification process for each conversation, it was admitted into evidence, and played for the jury. (R. 1111-1435.) The procedure for the two conversations which ap-

* During the trial, the prosecutor revealed to the Court that Holtzman "has heard this tape played on many occasions" (R. 1452) and, "he's heard that tape ad infinitum." (R. 1454.)

peared on Exhibit 9 (the Headline wiretaps in which the Petitioner was one of the participants), and the respective transcriptions of these conversations (Exhibits 9-a and 9-b) appears at A. 227-233. The Exhibit 9-a conversation was received into evidence at A. 230, the transcription was distributed to the jury, and the conversation was played for the jury at A. 230. The Exhibit 9-b conversation was received into evidence at A. 232, the transcription was distributed to the jury and the conversation was played for the jury at A. 233. As to each, the Petitioner entered his objection that the exhibits were incompetent, immaterial, irrelevant and had no probative force. The objections were overruled. (A. 229; 232.)

The Prosecution did not offer into evidence the recorded conversation which had been seized from the public telephone at Patrissy's Restaurant.

The Prosecution's Characterization of the Petitioner's Wiretapped Conversations as Being an Absolute Unqualified Confession.

In his opening address to the jury, the Prosecutor declared that the defendant's wiretapped conversation was "an absolute, complete admission of his part and parcel in this conspiracy." (A. 106.) In his summation, the prosecutor's expressed thoughts concerning the character of these conversations underwent an evolution. He commenced by telling the jury that the tapped conversation "goes further than being an admission, which I say to you, were this said to a police officer, would be an absolute, absolute confession. . . . " (A. 247.) Then, referring to the Petitioner, the prosecutor stated "because on Exhibit 9-a and 9-b he confessed to that. . . . " (A. 248.) This was fol-

lowed by "Now what do you have Mr. Kaiser saying in this confession?" (R. 2576), and "That's the plain word meaning. That's an admission, a confession." (A. 249.) Finally, at the close of the prosecutor's summation, the defendant's taped words became an absolute unqualified confession:

> "You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's Exhibits 9a and 9b by this defendant, Thomas Kaiser." (A. 249.)

Based upon the above characterizations, the defense moved for the withdrawal of a juror (declaration of a mistrial). (A. 250.) There was an extended colloquy on the question, in which the Court made clear that it would not characterize the wiretapped conversations as confessions (A. 250-253) and stated:

> "Well, I'm concerned about it. There is no question I'm concerned with it. And, I'll tell you frankly, Mr. Doolittle, I'm quite upset after a month's trial, after your statement I'm quite upset about it." (A. 252.)

The Court revealed that he had not said anything during the Prosecutor's summation because he would just highlight the error. (A. 252.)

The defense motion for a mistrial was denied, and counsel requested that the Court attempt to cure the error in his charge. (A. 253.) In his charge, the Court merely defined the distinction between an admission and a confession. (A. 258.) No instruction was given that there was no confession in the case.

The Defense

In view of the serious question posed by the above mentioned references to the Petitioner's conversations, we believe it appropriate to submit to this Court the Petitioner's version of the meaning of those conversations. The Petitioner took the stand in his own defense. He testified that he had known Dino Conte from boyhood—for over fifteen years. They had grown up in the same neighborhood. (R. 1853.)

He had met Irving Holzman in the beginning of 1963 at a time when he had bought a Bar together with a partner in Richmond Hill. At that time he met one Robert Luttman, an employee of Irving Holzman, and was introduced by Luttman to Holzman. During this period he borrowed money from Holzman in connection with a Bar known as the Imperial Room, a loan which the defendant paid off. (R. 1862.) During the latter part of 1963, Irving Holzman wanted to have the defendant become interested and operate a series of Bars and Grills in which Holzman had become interested. These never materialized. (R. 1870-1875; 1877-1885.)

The defendant also testified that he knew Salvatore Granello, also known as Sally Burns. He testified that he first saw him in April, 1964 in the Headline Bar located on West 43rd Street, Manhattan. (R. 1887.) At the time, his friend Dino Harris (Conte) was manager of the Headline Bar. Kaiser occasionally helped at the Bar on weekends. He occasionally saw Granello (Burns) there but was never introduced to him. (R. 1887, 1889.) The defendant testified that sometime in May of 1964 his friend Dino Conte asked him who Irving Holzman's partners were. (R. 1901, 1902.) Kaiser learned about Holzman's business dealings from Robert Luttman. (R. 1903.) Kaiser further

testified that he gave Dino Conte additional information which he requested about the relationship between Holzman and Luttman. He said that he discussed what percentages Holzman and Luttman had between them and as to who was the senior partner. (R. 1915.) Kaiser testified that he was giving information to Dino about Holzman concerning the nature of the routes and location, the percentages that Luttman and Holzman had over their business enterprise. (R. 1917-1918.)

All the way through Kaiser's extensive testimony, both on direct and cross-examination, he stated that the information which he gave to Dino either on the wiretap that was placed before the jury or personally, was information which he had obtained from Luttman. (e.g., R. 1919.)

Throughout his testimony, Kaiser maintained that he was not aware that Granello was involved in a criminal enterprise. Repeatedly during his testimony, he stated that he was merely furnishing information obtained from Luttman and that such information was given by him in the belief that it concerned a business relationship between Granello and Holzman, the details of which he did not know. (e.g., R. 1925.) The burden of his lengthy direct and cross-examination concerning the wiretaps is to the effect that he was not a conscious part of any conspiracy, or of any coercive tactic, nor was he engaged in any extortion attempt. (R. 2081-2423; 2460-2469.)

At the time of his arrest, the authorities played some of the tapes for Kaiser. (R. 1925.) He told the arresting officer that he didn't understand the true nature of what had been going on between Granello and Irving Holzman. He said he thought that they were discussing a business

negotiation stemming from a great deal of money that Holzman owed from years back. (R. 1925.) Kaiser denied that he was a part of any conspiracy and volunteered to take a lie detector test but was not given one. (R. 1926-1927.)

The basic question for the jury's resolution was whether the defendant ever became a co-conspirator with Conte and Granello.

Summary of Argument

1. The introduction to our argument emphasizes the new and unique problems created by wiretapping in a telephone structured society (p. 43). We show that wiretapping poses a grave threat to individual privacy, security and dignity. No analogy to wiretapping can be found in the pretelephone era. It involves not only the unavoidable presence of a third party, but also his unknown presence. The fears thus raised involve serious questions concerning whether the atmosphere thereby generated is conducive to the spirit of liberty and respect for lawful authority which ought prevail in a free society (p. 45). Additionally, evidence obtained by wiretapping is inherently unreliable. This is so for a number of reasons:

Conversations are taken out of the context of personal experience which the conversants share with each other (p. 46); a defect in an automatic recording machine, used for wiretapping, or in its source of power can cause whole words or sentences to be eliminated from the tape recording (p. 47); and careful editing and re-recordation can completely alter what was said with no detectable evidence that this has been done (p. 48). Except under the most ideal of circumstances, wiretapping is indiscriminate. If any phone may be tapped then every phone must be viewed

as being tapped (p. 46). Additionally, the unparalleled dredging of the personal lives of those who chance to call to or from a tapped telephone, creates grave difficulties concerning public dependence upon the personal integrity of the officials who are charged with reviewing the seized conversations (p. 47). Finally, we urge that wiretapping be given a different and more fundamental treatment than other search and seizure situations (p. 48).

2. We then argue (p. 49) that since wiretap evidence seized in violation of the Federal Communications Act is inadmissible in a State criminal proceeding, the Petitioner's conviction should be reversed. For this result, we rely upon a prospective application of *Mapp* v. *Ohio*, 367 U.S. 643 (p. 52), and, alternatively, upon a limited retroactive application of *Lee* v. *Florida*, —— U.S. ——, 88 S.Ct. 2096 (p. 53), and upon the fact that the prohibitions involved do not come as a surprise to the prosecutive and judicial officials of the State of New York, but rather, that those officials deliberately chose to violate the unequivocal mandates which they were constitutionally bound to obey (p. 54).

3. For the purpose of fortifying the Petitioner's request for a reversal of his conviction, and in the belief that a system of ordered liberty requires the resolution of the basic Fourth Amendment problems created by wiretapping, we argue that the Federal Communications Act was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments. The significant feature of this argument is that the absolute prohibition contained in the Act consequently made unreasonable, within the meaning of those Amendments, any search for telephone conversations (p. 58).

4. We conclude Point I by urging that, aside from the complete wiretap ban imposed by Section 605, the Federal Constitution, itself, imposes a similar ban. The first aspect of this theory depends upon the interaction between the reserved rights provision of the Ninth Amendment and the search and seizure provision of the Fourth Amendment. We reason that the Ninth Amendment prevents the novel invasion of privacy presented by wiretapping from automatically being incorporated into the Fourth Amendment grant of a limited right to search and seize, and this can be accomplished only by amendment of the Constitution. The second aspect of our theory depends upon the effective similarity between wiretapping and testimonial compulsion. We urge that the Fifth Amendment thus imposes an absolute ban upon wiretapping. The individual's defenses being down, as to intrusion by third parties, no distinction can be drawn between this and the medical pumping of his body or his mind (p. 61).

5. In POINT II, we urge that Section 813-a of the New York Code of Criminal Procedure is unconstitutional on its face as being violative of the Fourth and Fourteenth Amendments. We rely upon this Court's decision in *Berger* v. *New York,* 399 U.S. 41, a "bugging" case, which specifically held that statute to be unconstitutional. This Court's decision in *Katz* v. *United States,* 389 U.S. 347, is urged as having removed any question that the decision in *Berger* is equally applicable to wiretapping (p. 63).

6. In POINT III we charge that the wiretap order which resulted in the seizure of the Petitioner's conversations was unconstitutional in its origins, on its face, and in its implementation. We first establish that the order was not issued upon a showing of probable cause that the sought after

evidence would be obtained by the tapping of the telephone in question (p. 67). Additionally, we urge that permission for wiretapping should require a particular showing of necessity beyond that called for in the ordinary search and seizure application (p. 69).

7. Continuing on Point III, we attack the order as authorizing a general search of sixty days duration. We take *Berger's* specific analysis of Section 813-a, apply it to the order issued in the present case, and show that the shortcomings found in the statute exist identically in the order (p. 70). We utilize this Court's holding in *Katz* v. *United States,* 389 U.S. 347 to demonstrate that the officers who execute a search warrant must act upon prior judicial restraint, and not upon self-imposed restraint (p. 74). The *carte blanche* authorization given by the order herein was the equivalent of a general warrant. We round out our demonstration of the unrestrained and unsupervised invasion of Fourth Amendment rights by showing that the wiretap order did not provide for a return, nor was there in fact a return made (p. 76).

8. Applicable as well in Point III is the argument made under Point I, that the Ninth and Fifth Amendments imposed an absolute ban upon wiretapping (p. 61).

9. Our final argument under Point III is that the broad grant of wiretapping in the present case, covering a number of telephones, so compounded the unconstitutionality of the search as to make it decisively deprive the wiretapping of any semblance of due process. We note that we intend to move this Court for an order directing the District Attorney of Nassau County to deliver to this Court an inventory of all wiretap orders applied for, granted and

implemented in the present case, as well as all of the actual recorded tapes produced by the wiretapping in the present case (p. 78).

10. POINT IV urges that since the wiretapping herein constituted a direct violation of the Petitioner's Fourth Amendment rights against unlawful searches and seizures, his conviction should be reversed by a simple prospective application of *Mapp* v. *Ohio*, 367 U.S. 643, and, in any event, this case comes to this Court in the appellate process. *Linkletter* v. *Walker*, 381 U.S. 618, 622 (p. 80).

11. POINT V, our final point, involves the prosecutor's repeated references, in his summation to the jury, characterizing the Petitioner's wiretapped conversations as confessions (p. 81), and going to the extreme of calling them an "absolute, unqualified confession" (p. 83). Aside from the basic question of due process raised by the prosecutor's conduct, the prejudice to the Petitioner was compounded by two factors: This Court rendered its decision in the well publicized and much debated case of *Miranda* v. *Arizona*, 384 U.S. 436, during the course of the Petitioner's trial; and, the written transcripts of the Petitioner's conversations, to which the prosecutor referred as he made the above-quoted comment, created the aura of a *written* confession (p. 84). We urge that these factors effectively deprived the Petitioner of his rights as specified in the Fifth Amendment and guaranteed by the Fourteenth Amendment; we conclude that it would indeed be anomalous if a prosecutor may falsely impute a confession to a defendant, but in the case of certain persons who have actually confessed, reference to the actual confession requires the reversal of a conviction (p. 85).

ARGUMENT

Introduction to Argument

"The subject of this Essay is . . . the nature and limits of the power which can be legitimately exercised by society over the individual. A question seldom stated, and hardly ever discussed, in general terms, but which profoundly influences the practical controversies of the age by its latent presence, and is likely soon to make itself recognized as the vital question of the future. It is so far from being new, that in a certain sense, it has divided mankind, almost from the remotest ages; but in the stage of progress into which the more civilized portions of the species have now entered, it presents itself under new conditions, and requires a different and more fundamental treatment." *On Liberty,* John Stuart Mill, 1859, Introductory.

When Mill penned the above words, he could little have imagined the technological advances which now permit practically every individual, as a matter of course, to communicate with every other individual by instantaneous telephonic communication. This development has vastly broadened the barriers of time and space which formerly limited direct personal communications between individuals. Society and individual relationships have naturally adapted to this change and have thus, themselves, been transformed —no longer being structured upon the necessity for face to face communication, but, rather, liberated through the ready availability to all of this new form which in most cases can provide a complete and virtually interchangeable substitute for the old.

While having, in a very real sense, increased the freedom of the individual, the telephone has brought with it a host of new threats to that freedom. Individuals, living in a society which is structured upon face to face personal communication, were easily able to make adequate provision for the privacy of such communication. A society which has, however, been structured upon the use of the telephone, has made individual relationships susceptible to the undesired presence of third parties. This aspect of wiretapping is analogous to an interloper of the pre-telephone era having legal authority to remain within arm's reach of an individual whose personal conversations he wished to overhear. The writer is unfamiliar with any precedent in civilized jurisprudence which permitted such a rape of human dignity in the absence of official custody situations.

But, wiretapping is more than the simple presence of an undesired third party. A man in custody is aware of the circumstances in which he finds himself; he knows that there is a third party present. The presence of the wiretapper is not only unwanted, it is also unknown. The telephone caller has thus been deprived of the opportunity to take into account the presence of the third party in determining whether he will speak at all, and, if so, in what terms he will speak. In the United States, where there is one telephone for every two living human beings, there must, without doubt, be millions of telephone conversations held each day in which comments of a non-criminal nature are made which would remain unsaid if it were believed that a third party were listening in. It is no answer to state that most persons realize that telephone conversations can be tapped. The fact is that our telephone structured society operates, for the most part, upon the assumption that no one is listening in. It may well be that a

number of persons do refrain from speaking freely on the telephone for fear of intrusion, but that itself raises serious questions concerning whether the atmosphere thereby generated is conducive to the spirit of liberty and respect for lawful authority which ought prevail in a free society. Perhaps more than most other types of official conduct, the dreadful aura of a police state is raised by this awareness of official wiretapping. The recent report of a Presidential Commission partially set forth the problem:

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society." *The Challenge of Crime in a Free Society*, A Report of the President's Commission on Law Enforcement and Administration of Justice (1967), page 202.

Critical or constructive ideas, in the sense apparently meant by the Commission, form only a small part of those communications which are likely to be inhibited; what of those innumerable communications which have relevance only to the personal lives of those speaking and are the basic stuff of human relationships?

There is a second difficulty associated with the unknown presence. When human beings communicate, they often speak within the context of personal experience which they share with each other. If they believe themselves to be alone, they will speak in a shorthand which incorporates that context. Thus, a communication which has a clear meaning to the conversants, may have no meaning or an altogether different meaning to the eavesdropper. Similarly, a private comment, serious in tone, can be clearly understood by the parties to be made in jest, but misunderstood by the eavesdropper. The point is that if the presence of a strange third party is known, the parties to a conversation will alter their mode of expression so as to make their meaning clear to the third party.

Aside from the presence of the wiretapper being unwanted and unknown, it is, except under the most ideal of circumstances, indiscriminate. Such ideal circumstances will rarely be found, and thus, the wiretapper will find himself privy to conversations, not only of his subject, but quite probably of a number of other individuals. In the absence of a tapping device which can be programmed to pick up only the voices of certain individuals or only certain types of conversations, anyone who uses the telephone under surveillance will be heard. If law enforcement authorities may tap a phone which is available to the general public, then every such telephone must be viewed as pipeline to secret official surveillance. If law enforcement authorities may tap a private telephone, then all those who are within family or business groups which use such telephones, and all those who have reason to communicate with such groups, must view the instrument as possibly being such a pipeline.

Automatic recording devices of the type which were used in the present case multiply the problems which have been set forth above. Such devices are unattended by a human censor and are completely lacking in discrimination. They are purported to form a complete permanent record of what has been said (although not necessarily of what has been *communicated,* since what has been communicated may be realized only by the communicating parties). This unparalleled dredging of the personal lives of those who chance to call to or from the telephone instrument in question creates grave difficulties concerning public dependence upon the personal integrity of the officials who are charged with weeding out from the mass of conversation obtained only that information which they are lawfully seeking. The opportunity for the corrupt use of the irrelevant information is manifest.

Realizing the practical impossibility, in most cases, of limiting surveillance only to the reception of the particular information sought, it is likewise a practical impossibility for a judicial officer to review all of the information actually seized—both that which allegedly is relevant and that which allegedly is not. No one but the wiretapper need ever know all of what he has heard; no other person will be in a position to know that certain of the wiretapper's future conduct resulted from what he had heard.

A second aspect of the tape recordation of telephone conversations concerns the dependability of the final product which is presented to a judge or jury. A defect in the recording machine or in its source of power can cause whole words or sentences to be omitted from the tape recording, thus changing the meaning of what was said,

and no one—not even the wiretapper—would be the wiser. Additionally, it is common knowledge that by careful editing and re-recordation, individual words or sentences can be created with no detectable evidence that this has been done.

Our argument will, in the main, rely upon legal precedent to establish that the wiretapping conducted in the present case was in violation of both statutory and constitutional mandates. It must, however, be realized that the problems posed by wiretapping find no precedent in the human experience which produced the United States Constitution and its Bill of Rights. The official intrusion into human privacy which is occasioned by wiretapping finds no analogy in the pre-telephone era. In the words of Mill, above quoted, this Court is called upon to give wiretapping "a different and more fundamental treatment." The mere comparison by analogy to other, essentially different, seizure situations, would assume a basic similarity which does not, in fact, exist.

POINT I

The Wiretapping of the Petitioner's Telephone Conversations Was in Direct Violation of the Federal Communications Act (48 Stat. 1064, 1103, 47 U.S.C. 605) and Article VI of the United States Constitution; the Use of Those Conversations as Evidence Against the Petitioner Was Thus in Violation of Federal Organic Law and of the Petitioner's Right to Due Process of Law as Guaranteed by the Federal Fourteenth Amendment and as Specified in the Federal Fourth, Fifth and Ninth Amendments.

A. Wiretap Evidence Which Is Secured in Violation of the Federal Communications Act Must Be Excluded in State Criminal Prosecutions.

The indictment and conviction of the Petitioner were completely dependent upon the use against him of certain of his telephone conversations which were seized by State Officials through the use of wiretapping. These interceptions and the use of the evidence obtained thereby were without the authorization of the Petitioner or of the other party to the telephone conversations in question. Independent of the evidence so obtained, the People of the State of New York clearly and stipulatedly were possessed of nothing which implicated or tended to implicate the Defendant in the crimes of which he was convicted (page 7, *supra*).

Section 605 of the Federal Communications Act (48 Stat. 1064, 1103, 47 U.S.C. § 605) was in effect during all of the period covered by the events of the present case; the Statute continued in effect during all of the proceedings in the

Courts below. That Statute provided, in pertinent part, as follows:

> "... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person ..."*

In *Lee* v. *Florida*, —— U.S. ——, 88 S.Ct. 2096 (1968), this Court reaffirmed what it had previously held in *Benanti* v. *United States*, 355 U.S. 96 (1967): wiretapping by State officials and the introduction of the fruits of such wiretapping at a State trial violate the clear prohibitions of Section 605. *Lee* went further, however, and declared that a State conviction will not be permitted to rest upon evidence so obtained:

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* Since the grant of certiorari in the present case, Federal statutory law concerning wiretapping has undergone a complete revision. Title III of the *Omnibus Crime Control and Safe Streets Act of 1968* created, *inter alia*, a comprehensive scheme of permissive wiretap legislation applicable to wiretapping by both Federal and State officials (18 U.S.C., Chapter 119). Section 605 was amended so as to prohibit all wiretapping other than that permitted by the new legislation.

We shall, during the course of our argument, demonstrate that the procedures followed in the instant case fall far short of those required by the new legislation. While the new legislation cannot, and does not purport to, retroactively validate earlier accomplished wiretapping, such a comparison is instructive in revealing the current Congressional feeling concerning minimal standards which ought be required for wiretapping. We, of course, do not suggest that the new legislation complies with Federal Constitutional requirements.

For the convenience of the Court, the text of Title III is reproduced in Appendix B, hereto, *infra*.

"• • • In the *Mapp* case, the Court in overruling *Wolf* imposed a judicially devised exclusionary rule in order to insure that a State could not adopt rules of evidence calculated to permit the invasion of rights protected by Federal organic law. In the present case the Federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place.

"But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' *Elkins* vs. *United States,* 364 U.S. 206, 222. Under our Constitution no court, State or Federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State (are) bound. . . .'

"Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz* vs. *Texas* that '(e)n-forcement of the statutory prohibition in § 605 can be achieved under the penal provisions' of the Communications Act. 344 U.S., at 201. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion of the illegal evidence will compel respect for the Federal law 'in the only effectively available way—by removing the incentive to disregard it'. *Elkins* vs. *United States,* 364 U.S., at 217." —— U.S. ——, 88 S.Ct. 2096, 2101.

The prosecution and conviction of the Petitioner having been completely dependent upon the use in evidence of his wiretapped conversations, his case falls squarely within the above enunciated ruling.

B. The Exclusionary Rules Which Pertain to Evidence Secured in Violation of the Federal Communications Act Apply to the Petitioner's Case and His Conviction Should Be Reversed.

Lee v. *Florida, supra,* made clear that the proper application of this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), rendered inadmissible in a State criminal trial any evidence which had been obtained in violation of Section 605 (88 S.Ct. 2096, 2100-2101). All of the events in the present case, including the issuance of the wiretap orders, occurred after the *Mapp* decision. A prospective application of *Mapp* thus requires that the Petitioner's conviction be reversed.

We submit that no genuine issue of retroactivity may be raised in this case. The reasons for this assertion are as follows:

1. The basic rationale of *Mapp* would be effectively nullified if the exclusionary timetable were altered for each different means or object of search and seizure presented to this Court. *Mapp* declared the basic rule which is applicable to all illegal search and seizures in that "... the exclusionary rule is an essential part of both the Fourth and the Fourteenth Amendments ..." 367 U.S. 643, 657. No concept of ordered liberty could reasonably adopt a shifting schedule of exclusion within the search and seizure area, dependent upon method or object of search.

2. Even if *Lee* v. *Florida, supra,* were considered to be pivotal decision for the running of a new exclusionary timetable specifically concerning the seizure of telephone conversations, consistency would require that the basic search and seizure timetable enunciated by this Court should apply to the seizure of telephone conversations. Thus, if the Petitioner's case involves a retrospective application of *Lee,* rather than a prospective application of *Mapp,* the search and seizure rulings of this Court, as exemplified by *Linkletter* v. *Walker,* 381 U.S. 618 (1965), would still require that the Petitioner's conviction be reversed. This is made clear by a simple replacement of the citation to *Mapp* with a citation to *Lee* in the following excerpt from *Linkletter*:

> "Initially we must consider the term 'retrospective' for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the court. • • • However, we are not here concerned with pure prospectivity since we applied the rule announced in *Mapp* to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered. [*Ker* v. *State of California,* 374 U.S. 23 (1963); *Fahy* v. *State of Connecticut,* 375 U.S. 85 (1963); *Stoner* v. *State of California,* 376 U.S. 483 (1964).]* Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion. [By final we mean where the judgment of conviction was

* Footnotes in the original opinion are here included as bracketed references.

rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*.]" 381 U.S. 618, 622.

3. In applying the *Mapp* and *Lee* decisions to the present case, no problem can be presented by any claim of surprise on the part of State officials. The law enforcement officials and courts of the State of New York have been on clear notice, at least since this Court's opinion in *Benanti* v. *United States*, 355 U.S. 96 (1957), that wiretapping by State officials, even when done pursuant to Section 813-a of the New York Code of Criminal Procedure, is a direct criminal violation of the prohibitions contained in Section 605 of the Federal Communications Act. The wiretapping which was done in *Benanti* was done pursuant to Section 813-a of the New York Code of Criminal Procedure, and, similarly to the present case, the wiretapping was done upon the wires of a public bar. 355 U.S. 96, 97.

By that decision, this Court put an unequivocal end to the argument that the Constitution and statutes of the State of New York provided legitimate authority for the wiretaps:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communications. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. • • • (K)eeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow State legislation which

would contradict that section and that policy." 355 U.S. 96, 104-106.

There could have been no reasonable doubt that State respect for this prohibition was Constitutionally mandated. Article Six, Clause Two of the Federal Constitution, commonly known as the Supremacy Clause, provides as follows:

> "This Constitution *and the laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Emphasis added.)

Likewise, State authorities have been on notice since the 1961 decision in *Mapp,* that evidence seized in violation of Federal law may not be used in a State prosecution. Mapp's emphasis upon the observance of due process in the administration of criminal justice by the States completely changed the constitutional context in which the criminal act of wiretapping by State police officers had to be examined. *Mapp* made it clear that the effects of lawless behavior by State police officers in securing evidence would no longer be left to the discretionary rules of state practice:

> "Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom

door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." 367 U.S. 643, 654-655.

"Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a state's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins*, 'the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts'." • • • 364 U.S. 643, 657-658.

"Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. 'However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring ef-

fectiveness'. *Miller* v. *United States,* 1958, 357 U.S. 301, 313." 367 U.S. 643, 657-658.

Indeed, the trial judge, during the course of the pre-trial wiretap hearing in the present case, expressed the opinion that the wiretaps should have been excluded for failure to comply with Federal standards, but found himself bound by the decisions of the State Court of Appeals. (A. 86-87, 94.)*

It is thus clear that the prohibitions involved come not as a surprise to the prosecutive and judicial officials of the State of New York, but rather, that those officials deliberately chose to violate the unequivocal Federal mandates which they were Constitutionally bound to obey.

In considering whether any proceedings based upon such a blunt defiance of Constitutional, judicial and prosecutive duty should be held legitimate, reference is made to the following section of the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438 (1928). It was quoted with approval in this Court's opinion in *Miranda* v. *Arizona,* 384 U.S. 436, 479-480 (1966), and its message could not be more timely:

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will

* Prior to the wiretapping in the present case, a number of New York State Judges had likewise concluded that Section 605 required the exclusion of wiretap evidence. See, for example: *People* v. *Dinan,* 11 N.Y. 2d 350, 229 N.Y.S. 2d 406 (1962) (dissenting opinion in which three judges joined); *In re Telephone Communications,* 9 Misc. 2d 121, 170 N.Y.S. 2d 84 (N.Y. Sup. Ct., 1958); *Application for Interception of Telephone Communications,* 23 Misc. 2d 543, 198 N.Y.S. 2d 572 (N.Y. Ct. Gen. Sess., 1960).

> be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means • • • would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U.S. 438, 485.

For the above reasons, this Court's holdings in *Benanti, Mapp* and *Lee* require the reversal of the Petitioner's conviction.

C. The Federal Communications Act Brought Telephone Conversations Within the Realm of Privacy Which Is Protected by the Federal Fourth and Fifth Amendments, and the Search for and Seizure of Such Conversations Was Unreasonable in a Constitutional Sense by Virtue of the Absolute Prohibitions of the Act.

We have established above that Section 605 requires the exclusion of wiretap evidence in State prosecutions and we have argued that this requirement should apply so as to reverse the conviction of the Petitioner herein. In doing so, we have relied upon the reasoning of *Lee* v. *Florida, supra,* which did not reach the issues raised under the Fourth and Fourteenth Amendments. —— U.S. ——, 88 S.Ct. 2096, 2097, footnote 2. We shall here and under Point II, *infra,* urge that serious Fourth, Fifth, and Fourteenth Amendment questions are raised by the wiretapping

in the instant case, and that the resolution of those questions should be dealt with directly by this Court so as to eliminate the state of confusion now existing concerning whether any wiretapping at all is Constitutional, and, if so, under what circumstances. A system of ordered liberty requires such a resolution. In the event that this Court does not choose to apply its holding in *Lee* v. *Florida, supra,* so as to require the reversal of the Petitioner's conviction, we urge that these Constitutional considerations require such a reversal.

We here argue that the interaction between Section 605 and the Fourth and Fifth Amendments extended the reach of those amendments and required the exclusion of the wiretap evidence; more specifically, Section 605 was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments, and the absolute prohibition contained in Section 605* made unreasonable, within the meaning of those Amendments, any search for telephone conversations.

There can be no doubt that Congress intended by Section 605 to protect the privacy of communications. In effect, Section 605 was a clear expression of the public policy of the United States concerning the privileged character of electronic communication. This statute, by its terms, conferred a right of privacy upon individuals engaged in telephone conversations, and declared telephone communications to be a legislatively protected area. Cf. *Nardone* v. *United States,* 302 U.S. 379, 384 (1937).

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* "No person not being authorized by the sender may intercept any communication . . . "

The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers and effects shall not be violated.

As was stated in *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (D.C. Cir., 1949) aff'd 339 U.S. 1, this Amendment:

> ". . . did not confer a right upon the people. It was a precautionary statement of a lack of Federal power coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the Amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon."

In this second phase of our argument we urge that Section 605 extended the individual's right of privacy to his telephone conversations; it broadened the enclave of privacy to which the individual may lay claim under the Fourth, Fifth and Fourteenth Amendments, regardless of whether those Amendments would otherwise directly provide such protection. Although Congress may not restrict the application of a fundamental Constitutional guarantee, it may, when acting within its legitimate area of authority —here, interstate communications—confer additional rights upon the individual, which rights, by their nature, are drawn within the protection of the Constitutional guaran-

tee. The validity of this line of reasoning becomes apparent by analogy to property rights. If the United States Congress should grant a property right of any kind to an individual, that new property right would be drawn within the protection of the Fourteenth Amendment guarantee which prohibits the States from depriving any person of property without due process of law. In the present case, Congress has granted an added right of privacy, and has made that added right absolute; that added right was drawn within the protection of those Amendments which have the function of protecting privacy—the Fourth, Fifth and Fourteenth Amendments. The absolute prohibition contained in Section 605 thus made all wiretapping *per se* Constitutionally unreasonable.

D. Insofar as the Invasion of Privacy Involved in Wiretapping Was Not Contemplated by the Constitution and the Bill of Rights, the Ninth Amendment Should Be Interpreted so as to Prohibit All Wiretapping; Insofar as Wiretapping Is a Form of Testimonial Compulsion, the Fifth Amendment Should Be Interpreted so as to Prohibit All Wiretapping.

Since, under this point we have been discussing the absolute ban imposed by Section 605 upon wiretapping, we will here advance the Fifth and Ninth Amendments of the Federal Constitution as providing a similar absolute ban.

The Ninth Amendment provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As we show in the Introduction to our Argument, *supra*, at page 43, no analogy from the pre-telephone era can be made to wiretapping. Indeed, outside the area of eaves-

dropping, we know of no case which authorized the seizure of something which has not yet come into existence. To assume that the novel invasion of privacy permitted by wiretapping is automatically incorporated in the Fourth Amendment grant of the limited right to search and seize, flies in the face of the guarantee found in the Ninth Amendment. Unless the Federal Constitution is amended to specifically permit wiretapping, wiretapping should be construed to be the invasion of a right to privacy retained by the People.

This Court has long acknowledged the overlapping functions of the Fourth and Fifth Amendments in protecting individual privacy. *Boyd* v. *United States,* 116 U.S. 616, 532 (1886); *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965).

The Fifth Amendment's injunction that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . " is here urged as prohibiting the seizure of a man's private thoughts and words. We submit that the invasion involved in wiretapping is not better, and probably worse than the emptying of a man's stomach to secure evidence from him, *Rochin* v. *California,* concurring opinion of Mr. Justice Black, 342 U.S. 165, 174. In that case Mr. Justice Black said:

> "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science." 342 U.S. 165, 175.

We submit that wiretapping constitutes just such a contrivance.

This Court had held that the compulsion of testimony by the use of truth serum constitutes a deprivation of due process. *Townsend* v. *Sain*, 372 U.S. 293, 307-309 (1963). We urge that there is no meaningful distinction between that case and this. The individual's defenses being down, as to intrusion by a third party, no distinction can be drawn between wiretapping and the medical pumping of a man's body or his mind.

POINT II

Section 813-a of the New York Code of Criminal Procedure Is Unconstitutional on Its Face as Being Violative of the Federal Fourth and Fourteenth Amendments.

In *Berger* v. *New York*, 388 U.S. 41 (1967), this Court had before it the same permissive eavesdropping statute which provided the authority for the wiretapping in the present case, Section 813-a of the New York Code of Criminal Procedure (*see* 388 U.S. 41, 43, footnote 1).* *Berger*

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* Since the grant of certiorari in the present case, New York State statutory law concerning wiretapping has undergone a complete revision. Section 813-a has been repealed, and Title III of the New York Code of Criminal Procedure has been enacted in its place. Laws of 1968, Chapter 546. We shall, during the course of our argument, *infra*, Point III, pages 67-79, demonstrate that the procedures followed in the instant case fall far short of those required by the new legislation. As we noted *supra*, at page 50, in relation to the new Federal eavesdropping law, such a comparison is instructive in revealing the current legislative feeling concerning minimal standards which ought to be required for wiretapping. The new State statute is expressly made inapplicable to wiretapping performed prior to its enactment. New York Eavesdropping Warrants Law, Section 6; Appendix C hereto, *infra*, pages C10-11.

For the convenience of the Court, the text of the new New York statutes is reproduced in Appendix C, hereto, *infra*.

involved "bugging" pursuant to that statute. An examination of Section 813-a reveals that it provides for identical procedures whether the order sought is for "bugging" or wiretapping. The statute is reproduced in Appendix A hereto, *infra*.

Berger revealed Section 813-a to be tragically unconstitutional:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised." 388 U.S. 41, 44.
>
> " . . . we have concluded that the statute is deficient on its face in other respects. Since the Petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavits upon which the eavesdrop orders were based, or the standing of Petitioner to attack the search and seizure made thereunder." 388 U.S. 41, 55.
>
> "Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. *As it is written,* we believe that it does." 388 U.S. 64. (Emphasis added.)

So as to avoid repetition, we defer our analysis of the specific Section 813-a procedural requirements (or, more precisely, non-requirements), until our discussion of the actual procedures which were followed in the present case.

Pages 67-79, *infra*. The fact remains that this Court has declared the statute to be unconstitutional on its face and has refused to uphold the validity of search and seizure performed pursuant to the statute.

In passing upon the Petitioner's case, the New York Court of Appeals had the benefit of this Court's decision in *Berger, supra*. One of the grounds relied upon by the Court of Appeals in sustaining the wiretapping herein was that *Berger* dealt only with "bugging" by trespassory intrusion upon private premises, and did not affect wiretapping, which is non-trespassory in nature. (*People v. Kaiser*, 21 N.Y. 2d 86, 99-101; A. 316-318). The Petitioner submits that this Court's pronouncements in *Katz* v. *United States*, 389 U.S. 347 (1967), have dissipated that aspect of the Court of Appeals decision, and have revealed wiretapping to constitute a search and seizure.

In specifically overruling *Olmstead* v. *United States*, 277 U.S. 438 (1928) and in making clear that "the Fourth Amendment protects people, not places", *Katz* simply applied the eighteenth century concept of privacy to the twentieth century world of scientific snooping. 289 U.S. 41, 88 S.Ct. 507, 511-512.

Katz involved the unique situation of "bugging" being used by Federal agents to listen to the words uttered into a public telephone by a suspect. Although this was not wiretapping, the situation provided the opportunity for the opinion to deal with the essential problem involved in wiretapping:

> "The Government stresses the fact that the telephone booth from which the Petitioner made his calls was constructed partly of glass, so that he was as visible

after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." 289 U.S. 347, ——, 88 S.Ct. 507, 511-512.

Although *Katz* involved the activities of Federal agents, the same search and seizure standards are applicable to the States. *Ker* v. *California,* 374 U.S. 23, 33-34 (1963), *Aguilar* v. *Texas,* 378 U.S. 108, 110 (1964).

In what amounts to a postscript to its opinion, the Court of Appeals attempted to "rehabilitate" Section 813-a by reading into it the concededly absent requirements of the Fourth Amendment. 21 N.Y. 2d 86, 103-05; A. 320-321. The questionable constitutional validity of this judicial revision of the statute is discussed by Chief Judge Fuld in his dissenting opinion, 21 N.Y. 2d 86, 109-110; A. 326-328. In any event, as revealed, *infra,* under Point III, the procedures followed in the instant case do not conform to the rehabilitated statute, and the new standards read into the statute by the Court of Appeals are expressly made applicable only to wiretapping performed after the date of the decision in *Berger* v. *New York,* 21 N.Y. 2d 86, 103; A. 320.

Since wiretapping does constitute a search and seizure, the holding of this Court in *Berger* v. *New York, supra,* requires that the tapping of the Petitioner's telephone conversations pursuant to Section 813-a be declared unconstitutional.

POINT III

The Wiretap Order Herein Was Unconstitutional in Its Origins, on Its Face, and in Its Implementation, All of These Being in Violation of the Fourth, Fifth, Ninth and Fourteenth Amendments of the Federal Constitution.

A. The Wiretap Order Was Not Based Upon the Showing of Probable Cause Required for Searches Generally, nor Upon the Particular Showing of Necessity Which Ought Be Required in the Case of Wiretap Searches.

The written petition of the Assistant District Attorney who applied for the wiretap order was a form petition with the blanks appropriately filled in. (A. 17.) It alleged that he was then engaged in the investigation of crimes committed in violation of the Penal Law of New York, particularly Attempted Extortion, Conspiracy to Commit Extortion and Conspiracy to Commit a Crime. It stated that in connection with the above investigation, he was conducting an investigation of the criminal activities of Salvatore Granello, Dino Conte and other unknown persons,

> "who your Petitioner is informed and believes, have been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as par-

ticipants or as material witnesses, have knowledge or information regarding said crime and are in communication by telephone with other persons having such knowledge and information." (A. 17-18.)

The petition then goes on to allege that he has reason to believe the telephone at the Headline Bar is:

"... the means of carrying on and promoting criminal activities; and Petitioner is informed and has reason to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument ..." (A. 18).

Not one concrete fact concerning the alleged crimes is mentioned in the petition; it does not state the means being employed to commit the crimes, and it does not identify the victim. The request for authority to wiretap does not even allege that evidence *of the mentioned crimes* is likely to be uncovered; it states only that "evidence of crime may be obtained." (A. 18.)

Turning to the *ex parte* testimony given by the Assistant District Attorney in support of his application, the most that can be said is that the Assistant District Attorney had reasonable grounds to believe that the crime of extortion had been attempted by Granello and Conte. (A. 20-40.) The probable cause called for by the Fourth Amendment is not established simply by such a showing; there must be probable cause to believe that the search will uncover evidence of the alleged crime. No such probable cause was established by the testimony. The testimony simply revealed that Granello had had telephone conversations with Holtzman, and that one of a number of tele-

phones used by Granello was located in the Headline Club, a place where Granello would sometimes be. No firm or continuing connection of Granello with that telephone was shown; no actual past conversation between Granello and any other co-conspirator was alleged. To permit Granello's mere occasional use of the telephone at the Headline Club to fulfill the function of probable cause, would be to nullify the Fourth Amendment; it would sanction the tapping of every telephone with which Granello would come in occasional contact.

In *Berger* this Court has given strong indication that a particular showing of necessity, ought be required before an eavesdrop order should issue:

> "Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized." 388 U.S. 41, 60.

The recently adopted Federal and New York State eavesdropping statutes both expressly require such a showing of necessity, and provide that the application for an eavesdropping order must contain:

> "(d) a full and complete statement as to whether or not other investigative procedures have been tried and

failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518 (1)(c); Appendix B hereto, *infra*, page B16.

"(d) a statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought, and that such information is not otherwise legally privileged." N.Y. Code Crim. Proc., Section 817 (2)(d); Appendix C hereto, *infra*, page C4; *see also* sections 817 and 819, generally.

The lack of *probable* cause, in the present case, to believe that the sought after conversations would actually be seized, is all the more startling when it is realized that the telephone was located in a public bar/restaurant in the busy Times Square area of Manhattan.

B. The Wiretap Order Authorized an Unconstitutional General Search of Sixty Days Duration.

As issued, the wiretap order (A. 42) recited "that there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications of the telephone . . ." It provided that the District Attorney, the Assistant District Attorney and any and all persons employed or assigned to their control or direction:

". . . are hereby authorized and empowered to intercept and record all telephone communications made by and to Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls . . ."

over the telephone in question. The order provided for an effective period of sixty days, July 1, 1964 to August 29, 1965. (A. 43.)

The basic unconstitutionality of such a general warrant to search and seize was made clear by this Court in *Berger:*

> "• • • New York's broadside authorization rather than being 'carefully circumscribed' so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* vs. *Carrington,* 19 How. St. Tr. 1029, and which were then known as 'general warrants'. The use of the latter was a motivating factor behind the Declaration of Independence. In view of the many cases commenting on the practice it is sufficient here to point out that under these 'general warrants' customs officials were given blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown. The Fourth Amendment's requirement that a warrant 'particularly describ(e) the place to be searched, and the persons or things to be seized' repudiated these general warrants and 'makes general searches • • • impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant'. *Marron* vs. *United States,* 275 U.S. 192, 196 • • • " 388 U.S. 41, 58.

The opinion went on to show that the provisions of Section 813-a (which are identical with the provisions of the order herein) authorized nothing less than a general warrant:

"... the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded * * *'. But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. * * * Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. * * *" 388 U.S. 41, 59-60.

In attempting to overcome the above holding of *Berger*, the opinion of the Court of Appeals states, at 21 N.Y. 2d 86, 96; A. 312-313:

"With this requirement as with all the requirements of the statute the order in question complied. The most cursory examination of the testimony of the Assistant District Attorney made under oath before the

Judge who issued the warrant clearly indicates that there was probable cause to believe that a crime was being committed and that the conversations regarding threats to Mr. Holtzman and his family would be obtained.

"It is true that the order did not adequately specify the precise conversations which were sought—although the testimony of the Assistant District Attorney under oath, which becomes part of the order, did (Code Crim. Pro. § 813-a); that the order was not sufficiently limited in time—although there is no evidence that the execution of the order exceeded a reasonable period and the actual conversations seized came within a limited period of three days; that no exigent circumstances were alleged for dispensing with the notice requirement—although, under Supreme Court decisions defining 'exigent circumstances', those circumstances were present here (*Ker* vs. *California*, 374 U.S. 23, 37-40); and that there was no return on the warrant—although we presume, since the Defendant did not argue otherwise, that a return was made. [The authorization for the wiretaps included not only the conversations of Salvatore Granello and Dino Conte and those with whom they communicated but all those who communicated over the telephone located at the Headline Bar. Such authorization was necessary for the purpose of immunizing the police from prosecution for violating section 738 of the former Penal Law, since the very device which the police were apparently required to employ would pick up all conversations on the telephone in question. It is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial

supervision and subject to the severest constitutional restraints.]* The reason for these defects is obvious—there has been no previous decision outlining the necessity for those requirements which *Berger* found to be mandatory. Under these circumstances, a reversal of the conviction would not be warranted either under the decisions of this Court or the Supreme Court (*People* v. *McQueen*, 18 N.Y. 2d 337; *People* v. *DeRenzzio*, 19 N.Y. 2d 45; *People* v. *Rensing*, 20 N.Y. 2d 936; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293)."

The above approach is in direct conflict with that which was reaffirmed by this Court in *Katz* v. *United States*, 389 U.S. 347, ——, 88 S. Ct. 507, 514:

"The Government urges that, because its agents relied upon the decisions in *Olmstead and Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail

* The bracketed reference is to the footnote which appears in the original opinion.

of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.' *Agnello* vs. *United States,* 269 U.S. 20, 33, 46 S. Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ' *Wong Sun* vs. *United States,* 371 U.S. 471, 481-482, 83 S. Ct. 407, 414, 9 L.Ed. 2d 441. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes.' *United States* vs. *Jeffers,* 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

The same approach was taken by this Court in *Osborn* v. *United States,* 385 U.S. 323 and *Berger* v. *New York,* 388 U.S. 41.

It is true that an order was issued by a judge in the present case and there was none in *Katz,* but there was such an order in *Berger.* An analysis of the order in the instant case (reproduced at A. 41) reveals that no meaningful restraint was placed upon the wiretappers. They were authorized to intercept "*all* telephone communi-

cations made by and to Salvatore Granello, Dino Conte and *any and all other persons* communicating by both incoming and outgoing calls over the telephone" which was located in a public bar situated in the busy Times Square area of Manhattan. (*Emphasis added.*) The interceptions were authorized to continue for a period of sixty days and were without any provision for termination if the conversations sought were earlier seized. The order's blanket grant of permission was without adequate judicial supervision or protective procedures. An order, authorizing the board intrusion into privacy that is entailed in wiretapping, must be something more than a magical piece of paper signed by a judge and based only upon the reasonable belief that a crime is being committed and that one of the perpetrators of that crime sometimes uses a telephone which is located in a public place. The order herein was nothing more than that. No restrictions were placed upon the wiretappers other than that they tap the right telephone.

Petitioner therefore urges that the *carte blanche* authorization given by the order herein was the equivalent of a general warrant; that the warrant may not be brought within the requirements of the Federal Constitution by assuming that the wiretappers relied upon the prior decisions of this Court or by reference to the fact that they did less than the order permitted them to do.

C. The Wiretap Order Did Not Provide for a Return, nor Was There in Fact a Return Made.

The Court of Appeals, in its opinion, attempted to avoid the problem posed by the lack of a return provision in the order by stating:

> "It is true . . . that there was no return on the warrant —although we presume, since the Defendant did not argue otherwise, that a return was made." 21 N.Y. 2d 86, 96-97; A. 312-313.

We did argue to the Court of Appeals that the order did not provide for a return (*See,* for example, Appellant's Reply Brief in the Court of Appeals, pages 16-17)—that can be seen from an examination of the order itself (A. 41-42). It is difficult to understand the basis for the Court's presumption that although there was no such provision, a return was in fact made. There is no evidence anywhere in the record of such a return being made. Indeed, the record reveals clearly to the contrary. The testimony of the various policemen who installed the wiretap equipment, removed the recorded tapes, listened to them and stored them shows this to be the case. *See,* for example, the testimony of Detective Costello, who retrieved People's exhibit 9, (tape on which the Petitioner's conversations appear) from the recording machine, brought it home for the weekend, and on the following Monday morning ". . . brought it to the District Attorney's office for safekeeping." (R. 157-158.)

In answering our claim that no return was made, the State of New York, in its *Brief in Opposition* to our Petition for a Writ of Certiorari in this Court, said at page 20:

> "Nothing could be further from the truth. In the best way possible, a return was made to the defense counsel and the Judge prior to and during the trial."

It is clear from the minutes of the pre-trial wiretap proceedings, presided over by the trial judge, that prior to

that time, neither the judge nor defense counsel listened to the wiretaps in question or received a return thereof. (A. 62-63.) That hearing was almost two years after the seizures in question.

Both *Berger* and *Katz* leave no doubt that the type of return which is necessary to minimize the danger of an unlawful search, is not one which is made months or years after the search, and then only at the discretion of the police officers. It must be a return made by direction, and it should consist of prompt notification to the authorizing magistrate, showing how the order was executed and specifying in detail all that had been seized. *Berger* v. *New York,* 388 U.S. 41, 57, 60; *Katz* v. *United States,* 389 U.S. 347, ——, 88 S. Ct. 507, 514.

It is to be noted that the recently adopted Federal and New York eavesdropping statutes require such a return to be made and for the seized conversations to be carefully safeguarded. 18 U.S.C. 2518 (8)(a), Appendix B, hereto, *infra,* B19-20; New York Code of Criminal Procedure, Section 823(3); Appendix C, hereto, *infra,* page C8.

The complete lack of judicial supervision in the searches and seizures made in this case demonstrates that the law enforcement authorities operated under nothing less than an unconstitutional general warrant.

D. The Broad Grant of Wiretapping Permission in the Present Case, Covering a Number of Telephones, Compounded the Unconstitutionality of the Search, so as to Decisively Deprive the Wiretapping of Any Semblance of Due Process.

The seizure of the Petitioner's conversations was part of a comprehensive plan in which court orders were ob-

tained pursuant to Section 813-a, authorizing the wiretapping of at least four telephones, two of which were coin operated public telephones, and one (that over which the Petitioner's conversations were seized) was located in and available to the patrons of a restaurant bar situated in the busy Times Square area of Manhattan. The fourth telephone was apparently listed to a private home. At his trial, the Petitioner was prevented from ascertaining the actual number of telephones which were wiretapped (A. 126-128). The police officials who installed and supervised the wiretaps were either unable or unwilling to reveal the total number of reels of tape which the wiretapping produced (A. 147-148, 163-165, 169-170, 191-195).

Prior to the argument of this case, we shall move this Court for an order directing the District Attorney of Nassau County to deliver to this Court an inventory of all wiretap orders applied for, granted and implemented in the present case, as well as all of the actual taps produced by wiretapping in the case.

It is clear, from the testimony at the trial, that the District Attorney of Nassau County maintains a sizable staff of police officers whose primary duties are in the field of wiretapping. (See A. 136, 139, 143, 149, 156-158, 167-168 and 186-187.)

Without regard to other possible wiretaps, the four wiretaps which are known to have been made in this case were such a broad intrusion into the privacy of the public at large as to totally deprive the procedure of any semblance of due process, and regard for the protections of the Fourth Amendment. This was a fishing expedition into public privacy, with the mere hope that evidence might be turned up. For this reason alone, the wiretapping should be held to be an unconstitutional search and seizure.

POINT IV

Since the Wiretapping Herein Constituted a Direct Violation of the Petitioner's Fourth Amendment Right Against Unlawful Searches and Seizures, His Conviction Should Be Reversed.

Under Point IB, *supra,* at page 52, we argued that since the Petitioner's telephone conversations were seized in violation of the Federal Communications Act, his conviction should be reversed. We examined the exclusionary rule and urged that it be applied to the Petitioner's case. The reasoning there used, is adopted herein, and applies *a fortiori,* since a direct violation of the Fourth Amendment falls squarely within the rule of *Mapp* v. *Ohio,* 367 U.S. 643, and, in any event, this case comes to this Court in the appellate process. *Linkletter* v. *Walker,* 381 U.S. 618, 622.

POINT V

The Petitioner Was Denied a Fair Trial in Violation of the Federal Fifth and Fourteenth Amendments by the Prosecutor's Intentional and Repeated References, in His Summation to the Jury, Characterizing the Recorded, Wiretapped, Conversations of the Petitioner as "Confessions"; the Resulting Prejudice Was Compounded Since the Prosecutor, in Effect, Capitalized Upon the Fact That This Court Announced Its Decision in MIRANDA v. ARIZONA, 384 U.S. 436, During the Course of the Petitioner's Trial.

Of the mass of exhibits admitted into evidence at the trial, the wiretapped recordings of the Petitioner's two telephone conversations with Dino Conte were the only evidence alleged to connect the Petitioner with the crimes charged in the indictment. The Petitioner testified at his trial and swore that any information which he gave to Conte and Granello was innocently given and that he had no knowledge of a criminal conspiracy to extort. He said that it had been his understanding that this information would be helpful to Granello's collection of a long-standing debt from Holtzman.

There was no confession—signed or oral—by the Petitioner in this case. The tape recorded conversations certainly contain no confession or formal acknowledgment of guilt. They can be considered no more than circumstantial evidence. The full text of the conversations is reproduced in the Petitioner's Appendix at pages 269-296.

In view of the above, it was baseless and unfairly prejudicial for the prosecutor to repeatedly urge the jury in summation that the tape recordings contained confessions by the Petitioner.

The Petitioner's trial commenced on June 1, 1966 (R. 41) and the summations to the jury were made on July 5, 1966. This Court decided the landmark confession case of *Miranda* v. *Arizona*, 384 U.S. 436, on June 13, 1966, in the midst of the trial. It would be wishful thinking to assume that the jurors were not exposed to the great deal of publicity attendant upon that decision, as well as the national division of opinion concerning its merits.

Aside from the immediate effects of the *Miranda* decision, the mass media have saturated the public with news of recent court decisions concerning confessions. Aside from the earlier lay impression of the damaging nature of a confession, the average individual now has a vastly heightened impression of the damning nature of a true confession which is admitted into evidence. Since the prosecutor so frequently in his summation referred to the telephone conversations as being "confessions", there can be little doubt that a jury of laymen accepted his characterization.

The prosecution was, of course, free to urge the jury that the Petitioner's statements indicated guilt, but not that they confessed guilt. Likewise, Kaiser, the Petitioner, was free, as he did, to show that there was a thoroughly innocent meaning to his words. This was what the whole case was about, there not being any other evidence against the Petitioner. By using the tactic of calling the conversations "confessions", the prosecutor, in effect, informed the jury that there was no question of fact for them to pass upon.

We urge this Court that the use of this tactic by the prosecution denied the Petitioner a fair trial, and the due

process guaranteed by the Federal Fourteenth Amendment thus requires the reversal of his conviction on that ground.

The prejudicial course of conduct pursued by the prosecutor began in his opening address to the jury where he declared that Defendant's taped words were "an absolute, complete *admission* of his part and parcel in this conspiracy". (A. 106.) Then, lifting himself by his bootstraps, the prosecutor in summation declared that the words were the equivalent of an "absolute confession". (A. 247.)

There followed a procession of references to the alleged confession:

> ". . . he confessed to that the only thing he didn't realize that it would be broadcast to a jury of twelve of his peers." (A. 248.)
>
> • • • • •
>
> "Now what do we have Mr. Kaiser saying in this confession?" (R. 2576.)
>
> • • • • •
>
> "That's the plain word meaning. That's an admission, a confession." (A. 249.)

Finally, at the close of the prosecutor's summation the taped words became an unqualified confession:

> "You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's exhibits 9A and 9B by this defendant, THOMAS KAISER." (A. 249.)

People's exhibits 9A and 9B were the typewritten transcripts of the Petitioner's telephone conversations. (A. 175-176.) The above statement created the aura of a *written* confession.

Based upon the above characterization, the Defense moved for a mistrial. (A. 250.) There was an extended colloquy on the question in which the Court made clear that it did not consider the wiretapped confessions to be confessions. (A. 250-253.) The Judge stated:

> "Well, I'm concerned with it. There is no question I'm concerned with it. And, I'll tell you very frankly, Mr. DOOLITTLE, I'm quite upset after a month's trial, after your statement I'm quite upset about it." (A. 252.)

The Court revealed his own impression that the prosecutor had "equated the admission with a signed confession". (A. 251.) He noted that he had not said anything during the prosecutor's summation because that would just highlight the error. (A. 252.)

The Defense motion for a mistrial was denied and counsel requested that the Court attempt to cure the error in his charge. (A. 253.) However, in his charge, the Court merely defined the distinction between an admission and a confession. (A. 258.) No instruction was given that there was no confession in the case.

The prosecutor's intentional conduct herein, in effect, breached the Defendant's right against testimonial compulsion as specified in the Fifth Amendment. Aside from the basic question of the due process raised by the prosecutor's conduct, the surrounding circumstances in this situation (this Court's decision in *Miranda*, and the typewritten

transcript of the conversations) compounded the error. We urge that these factors effectively deprived the Petitioner of his rights as specified in the Fifth Amendment and guaranteed by the Fourteenth Amendment. It would indeed be anomalous if a prosecutor may, as was done here, falsely impute a confession to a defendant, and the consequent conviction is permitted to stand; whereas, in the case of certain persons who have actually confessed, reference to the actual confession requires the reversal of the conviction. *Miranda* v. *Arizona, supra.*

Conclusion

It is respectfully submitted that the judgment of the Court below should be reversed and the prosecution against the Petitioner, Thomas R. Kaiser, be ordered dismissed.

Respectfully submitted,

PETER L. F. SABBATINO
Attorney for Petitioner
Thomas R. Kaiser

HENRY J. BOITEL
Of Counsel

APPENDIX A

Text of the Constitutional and Statutory Provisions Involved

Constitution:

Article VI, Clause Two:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Four:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Five:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDICES

APPENDIX A

Text of the Constitutional and Statutory Provisions Involved.

United States Constitution:

Article Six, Clause Two

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Four

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Nine

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

Article One, Section Twelve

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by Constitutional Convention of 1938; approved by the people November 8, 1938.

Laws of the United States

47 U.S.C., Section 605

§ 605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for

the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

Laws of the State of New York

Code of Criminal Procedure, Section 813-a

§ 813-a. Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the Supreme Court or judge of a County Court or of the Court of General Sessions of the County of New York upon oath or affirmation of a District Attorney, or of the Attorney-General or of an officer above the rank of sergeant of any Police Department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon

satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

APPENDIX B

Omnibus Crime Control and Safe Streets Act of 1968

Public Law 90-351; 82 Stat. 197

(18 U.S.C. Chapter 119; 47 U.S.C. 605)

AN ACT

To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Omnibus Crime Control and Safe Streets Act of 1968".

• • • • •

TITLE III—WIRETAPPING AND ELECTRONIC SURVEILLANCE

FINDINGS

SEC. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, with-

out the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

SEC. 802. Part I of title 18, United States Code, is amended by adding at the end the following new chapter:

"Chapter 119. WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

"Sec.

"2510. Definitions.

"2511. Interception and disclosure of wire or oral communications prohibited.

"2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.

"2513. Confiscation of wire or oral communication intercepting devices.

"2514. Immunity of witnesses.

"2515. Prohibition of use as evidence of intercepted wire or oral communications.

"2516. Authorization for interception of wire or oral communications.

"2517. Authorization for disclosure and use of intercepted wire or oral communications.

"2518. Procedure for interception of wire or oral communications.

"2519. Reports concerning intercepted wire or oral communications.

"2520. Recovery of civil damages authorized.

"§ 2510. Definitions

"As used in this chapter—

"(1) 'wire communication' means any communication made in whole or in part through the use of facilities for the transmission of communications by the

aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

"(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

"(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

"(6) 'person' means any employee, or agent of the United States or any State or political subdivision

thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

"(7) 'Investigative or law enforcement officer' means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

"(9) 'Judge of competent jurisdiction' means—

"(a) a judge of a United States district court or a United States court of appeals; and

"(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

"(10) 'communication common carrier' shall have the same meaning which is given the term 'common carrier' by section 153(h) of title 47 of the United States Code; and

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

"§ 2511. Interception and disclosure of wire or oral communications prohibited

"(1) Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

"(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

"(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

"(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

"(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

"(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;"

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2)(a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

"(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

"(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

"(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or

oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

"(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

"§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

"(1) Except as otherwise specifically provided in this chapter, any person who willfully—

"(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, me-

chanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

"(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

"(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2) It shall not be unlawful under this section for—

"(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

"(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

"§ 2513. Confiscation of wire or oral communication intercepting devices

"Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be au-

thorized or designated for that purpose by the Attorney General.

"§ 2514. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

"§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in

evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

"§ 2516. Authorization for interception of wire or oral communications

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

"(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

"(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

"(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of

wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

"(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

"(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

"(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

"(g) any conspiracy to commit any of the foregoing offenses.

"(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application

is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

"§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

"(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

"(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

"(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

"(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the

provisions of this chapter shall lose its privileged character.

"(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

"§ 2518. Procedure for interception of wire or oral communications

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the

type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the

judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether

or not the interception shall automatically terminate when the described communication has been first obtained.

"(5) No order entered under this section may authorize or appprove the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

"(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

"(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

"(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

"(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be

destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

"(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

"(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communciations were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

"(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

"(10)(a). Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

"(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

"§ 2519. **Reports concerning intercepted wire or oral communications**

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

"§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.".

SEC. 803. Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) is amended to read as follows:

"UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

"SEC. 605. Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not en-

titled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress."

SEC. 804. (a) There is hereby established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (hereinafter in this section referred to as the "Commission").

(b) The Commission shall be composed of fifteen members appointed as follows:

(A) Four appointed by the President of the Senate from Members of the Senate;

(B) Four appointed by the Speaker of the House of Representatives from Members of the House of Representatives; and

(C) Seven appointed by the President of the United States from all segments of life in the United States, including lawyers, teachers, artists, businessmen, newspapermen, jurists, policemen, and community leaders, none of whom shall be officers of the executive branch of the Government.

(c) The President of the United States shall designate a Chairman from among the members of the Commission. Any vacancy in the Commission shall not affect its powers

but shall be filled in the same manner in which the original appointment was made.

(d) It shall be the duty of the Commission to conduct a comprehensive study and review of the operation of the provisions of this title, in effect on the effective date of this section, to determine the effectiveness of such provisions during the six-year period immediately following the date of their enactment.

(e)(1) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(A) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 a day for individuals.

(2) In making appointments pursuant to paragraph (1) of this subsection, the Chairman shall include among his appointment individuals determined by the Chairman to be competent social scientists, lawyers, and law enforcement officers.

(f)(1) A member of the Commission who is a Member of Congress shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

(2) A member of the Commission from private life shall receive $100 per diem when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the perfomance of such duties.

(g) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section. The Chairman is further authorized to call upon the departments, agencies, and other offices of the several States to furnish such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section.

(h) The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the one-year period following the effective date of this subsection. Sixty days after submission of its final report, the Commission shall cease to exist.

(i)(1) Except as provided in paragraph (2) of this subsection, any member of the Commission is exempted, with respect to his appointment, from the operation of sections 203, 205, 207, and 209 of title 18, United States Code.

(2) The exemption granted by paragraph (1) of this subsection shall not extend—

(A) to the receipt of payment of salary in connection with the appointee's Government service from any source other than the private employer of the appointee at the time of his appointment, or

(B) during the period of such appointment, to the prosecution, by any person so appointed, of any claim

against the Government involving any matter with which such person, during such period, is or was directly connected by reason of such appointment.

(k) The foregoing provisions of this section shall take effect upon the expiration of the six-year period immediately following the date of the enactment of this Act.

(j) There is authorized to be appropriated such sum as may be necessary to carry out the provisions of this section.

APPENDIX C

New York State Eavesdropping Warrants Law as Signed Into Law on June 5, 1968

(Laws of 1968, Chapter 546; New York Code of Criminal Procedure, Title III)

Sec. 1. Title Two-A of part six of the code of criminal procedure, consisting of sections eight hundred thirteen-a and eight hundred thirteen-b, is hereby repealed.

Sec. 2. Such code is hereby amended by adding to part six thereof a new title, to be title three, to read as follows:

TITLE III

Eavesdropping Warrants

Section

814. Eavesdropping warrants; definitions of terms.

815. Eavesdropping warrants; in general.

816. Eavesdropping warrants; when issuable.

817. Eavesdropping warrants; application.

818. Eavesdropping warrants; application; how determined.

819. Eavesdropping warrants; form and content.

820. Eavesdropping warrants; renewals.

821. Eavesdropping warrants; manner and time of execution.

822. Eavesdropping warrants; order of amendment.

823. Eavesdropping warrants; notice and return.

824. Eavesdropping warrants; safeguarding and custody of warrants and applications.

825. Eavesdropping warrants; reports.

Sec. 814. Eavesdropping warrants; definitions of terms. As used in this title the following terms have the following meanings: 1. "Eavesdropping warrant" means an order of a justice authorizing wiretapping or mechanical overhearing of conversation, as those terms are defined in section 250.00 of the penal law.

2. "Justice" means any justice of the supreme court who has been designated by the governor as a justice of an appellate division, or any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed.

3. "Applicant" means a district attorney, the attorney general, the police commissioner of the police department of the city of New York, or the superintendent of the state police. If a district attorney, the attorney general, the police commissioner of the police department of the city of New York or the superintendent of the state police is actually absent or disabled the term "applicant" shall mean that person designated to act for him and perform his official function in and during his actual absence or disability.

4. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

Sec. 815. Eavesdropping warrants; in general. Under circumstances prescribed in this title, a justice may, upon ex parte application of an applicant, issue an eavesdropping warrant.

Sec. 816. Eavesdropping warrants; when issuable. An eavesdropping warrant may issue only upon an appropriate application made in conformity with this title, and upon reasonable cause to believe that evidence of the commission of a particular crime, or information aiding in the apprehension of the perpetrator of a particular crime, may be obtained, and upon a showing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought.

Sec. 817. Eavesdropping warrants; application. 1. An ex parte application for an eavesdropping warrant or order of amendment must be in writing, subscribed and sworn to by an applicant.

2. The application must contain:

(a) A statement of facts establishing reasonable cause to believe that a particularly described crime has been, is being, or is about to be committed; and

(b) A statement of facts establishing reasonable cause to believe that the conversation of a particularly described person will constitute evidence of the particularly described crime that has been, is being or is about to be committed or that the conversation will aid in the apprehension of the perpetrator of such crime which has been, is being, or is about to be committed. The statement shall include a particular description of the place or premises where the conversation will occur or a particular description of the telephone or telegraph lines over which the conversation will occur; and

(c) A particular description of the type of the conversation sought to be overheard; and

(d) A statement of facts establishing that normal investigative procedures have been tried and have failed

or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought, and that such conversation is not otherwise legally privileged; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If practicable, the application should designate hours of the day or night during which the conversation may be reasonably expected to occur. If the character of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described conversation has been first obtained, the application must specifically state facts establishing reasonable cause to believe that additional conversations of the same type will occur subsequently; and

(f) If the applicant knows that a prior application has been submitted or a warrant previously obtained for eavesdropping on the person whose conversation is sought to be overheard, a statement fully disclosing the date, court, applicant, execution, results, and present status of the application or warrant.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based

either on personal knowledge of the applicant, or information and belief with the source thereof and the reason therefor specified.

Sec. 818. Eavesdropping warrants; application; how determined. 1. If the application conforms to section eight hundred seventeen, the justice may examine under oath any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to section eight hundred sixteen. Any such examination must be either recorded or summarized in writing.

2. If satisfied that grounds exist for the issuance of an eavesdropping warrant pursuant to section eight hundred sixteen, the justice may grant the application and issue an eavesdropping warrant, in accordance with section eight hundred nineteen.

3. If the application does not conform to section eight hundred seventeen, or if the justice is not satisfied that grounds exist for the issuance, the application must be denied.

Sec. 819. Eavesdropping warrants; form and content. An eavesdropping warrant must contain:

1. The subscription and title of the issuing justice; and

2. The date of issuance, date of effect, if known, and termination date. The effective period of the warrant must not exceed twenty days. If the effective period of the warrant is to terminate upon the acquisition of a particular conversation, the warrant may so provide. If the effective period of the warrant is not to terminate upon the acquisition of a particular conversation, the warrant must so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which eavesdropping may be conducted or has been approved; and

4. A particular description of the type of the conversation to be obtained by eavesdropping or which has been approved including a statement of the crime to which it relates; and

5. An express authorization to make secret entry upon a private place or premises to install the eavesdropping device, if such entry is necessary to execute the warrant.

Sec. 820. Eavesdropping warrants; renewals. 1. At any time prior to the expiration of an eavesdropping warrant or any renewal thereof, the applicant may apply to a justice for a renewal with respect to the same person, place, premises, or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application and any accompanying papers upon which it was issued.

The application for renewal must set forth the results of the eavesdropping already conducted, and it must set forth present grounds for extension in conformity with section eight hundred sixteen.

2. Upon such application, the justice may issue an order renewing the eavesdropping warrant and extending the authorization for a period not exceeding twenty days. Such an order shall specify the basis for the finding of present reasonable cause for the issuance of the renewal.

Sec. 821. Eavesdropping warrants; manner and time of execution. 1. An eavesdropping warrant may be executed by the applicant personally or by another person expressly and particularly designated by him for the purpose.

2. The warrant may be executed according to its terms during the hours specified, and for the authorized period or a part of the authorized period. Unless specifically otherwise ordered, the authorization must terminate upon the acquisition of the conversations described in the warrant. Warrants must be executed as soon as practicable. Upon

termination of the authorization in the warrant or any renewals thereof, eavesdropping must cease and any device installed for the purpose of the eavesdropping must be removed or permanently inactivated as soon as practicable. Entry upon a private place or premise for the removal or permanent inactivation of such device is deemed to be authorized by the warrant.

Sec. 822. Eavesdropping warrants; order of amendment. 1. When an eavesdropping warrant has been issued and is being or has been executed pursuant to this title and a conversation is overheard, the overhearing of which was not otherwise sought pursuant to such warrant, and such conversation constitutes evidence of a crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, an applicant must, as promptly as practicable, apply to the justice who issued such warrant for an order amending such warrant to include such conversation.

2. The application for an order amending an eavesdropping warrant must contain: (a) a statement of facts fully disclosing the circumstances of the overhearing of such conversation including the date of issuance and present status of the eavesdropping warrant and the substance of such conversation; and (b) a statement of facts establishing reasonable cause to believe that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime.

3. If the justice is satisfied that such conversation was overheard pursuant to the eavesdropping warrant and that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, he may amend such warrant to include such conversation.

Sec. 823. Eavesdropping warrants; notice and return. 1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed; or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

3. Within fourteen days after termination of the warrant or the last renewal thereof, a return must be made by the applicant to the justice who issued the warrant, which return the justice shall retain. The return shall consist of a report in writing subscribed and sworn by the applicant or by the person expressly and particularly designated by him to conduct or supervise the execution of the warrant, summarizing the conversations overheard or recorded, which may be thereafter used in criminal prosecution, lead to other evidence, or information leading to the apprehension of the perpetrator of a crime. It must also state whether the eavesdropping device has been removed or permanently inactivated.

Sec. 824. Eavesdropping warrants; safeguarding and custody of warrants and applications. Any eavesdropping warrant together with a copy of papers upon which the

application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A copy of such eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the justice issuing the same, and, in the event of the denial of an application for such an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the justice denying the same.

Sec. 825. Eavesdropping warrants; reports. In January of each year, each justice must report in writing on the operation of this title to the judicial conference. No report under this section shall be made on any eavesdropping until after notice has been served pursuant to section eight hundred twenty-three. The reports must contain:

(1) The number of applications made; (2) the number of warrants denied and issued; (3) the effective periods of such warrants; (4) the number and duration of any renewals; (5) the crimes in connection with which the warrants were sought; (6) the name of the applicant.

Sec. 3. Subdivision three of section 250.00 of the penal law is hereby amended to read as follows:

3. "Unlawfully" means not pursuant to an eavesdropping warrant.

Sec. 4. Section 250.20 of such law is hereby amended to read as follows:

Sec. 250.20. Divulging an eavesdropping warrant.

A person is guilty of divulging an eavesdropping warrant when, possessing information concerning the existence or content of an eavesdropping warrant issued pursuant to title three of part six of the code of criminal procedure, or concerning any circumstance attending an

application for such a warrant, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such warrant, or to the judicial conference, a legislative committee or temporary state commission, or to the telephone or telegraph corporation whose facilities are involved.

Divulging an eavesdropping warrant is a class A misdemeanor.

Sec. 5. Section forty-five hundred six of the civil practice law and rules, as last amended by chapter six hundred eighty of the laws of nineteen hundred sixty-seven, is hereby amended to read as follows:

Sec. 4506. Eavesdropping evidence.

Evidence obtained by any act of eavesdropping in violation of section 250.05 of the penal law, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section 250.05 of the penal law.

Sec. 6. In any civil or criminal action, proceeding or hearing or administrative or legislative hearing occurring after the effective date of this act, the admissibility of any evidence obtained by any act of eavesdropping prior to the effective date of this act, or any evidence obtained through or resulting from information obtained by any such act of eavesdropping, shall be determined according to the provision of law in force and effect immediately prior to the effective date of this act in the same manner as if this act had not been enacted.

Sec. 7. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 8. This act shall take effect immediately.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

WILLIAM CAHN
District Attorney, County of Nassau
State of New York
Attorney for Respondent
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
HENRY P. DE VINE
Assistant District Attorneys
of Counsel

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Preliminary Statement	3
Statement of the Case	3
The Evidence	3
The Corpus Delicti	5
The Kaiser's Involvement	14
Exhibit 8A	15
People's Exhibit 9B	17
SUMMARY OF ARGUMENT:	
POINT I	18
POINT II—In Section A, respondent argues that the telephone conversations herein *did not occur in a situation of privacy* and thus were not eligible for protection under the *Katz* rule, even if wiretapping were within the regulatory ambit of the Fourth Amendment	23
POINT III	26
POINT IV	26
POINT V	28
POINT VI	30
POINT VII	35
POINT VIII	35
POINT IX	37
POINT X	38

PAGE

ARGUMENT:

POINT I—It is respectfully urged that this Court should hold that wiretapping is not regulated by the Fourth Amendment 40

A. There is no merit in Petitioner's contention that section 605 of the Federal Communications Act brought telephone conversations within a realm of privacy protected by the Fourth and Fifth Amendments to the United States Constitution 40

B. It is respectfully urged that this Court limit the *Katz* rule to its special facts and hold that a non-trespassory wiretap interception of a telephone conversation is not a search and seizure within the control of the Fourth Amendment. A contrary decision, especially one ordaining a broad right of privacy, would render constitutionally suspect all other police investigative devices involving an invasion of privacy, since there may be no ground which seems plausible to State and Federal Courts on which such a principle could be limited so as not to apply to such devices as non-trespassory, non-electronic eavesdropping, informer intelligence, shadowing of suspects, visual observation with or without the use of binoculars, telescopes or other visual aids, non-trespassory stakeouts of premises in which criminal enterprises are being organized, etc. 42

C. The attempt to justify the extension of the Fourth Amendment's coverage to include telephonic privacy by recourse to the alleged inherent purpose or underlying values of that Amendment is a questionable exercise 56

D. It is respectfully submitted that official wiretapping should not be constitutionalized 62

PAGE

POINT II—If the Court should hold that wiretapping is regulated by the Fourth Amendment, it is respectfully submitted that it should find the wiretap evidence here in issue not violative of the Fourth Amendment 63

A. The telephone conversations herein did not occur in a situation of privacy and thus were not eligible for protection under the *Katz* rule even if wiretapping were within the regulatory ambit of the Fourth Amendment 63

B. If the *Berger-Katz* criteria are applied retroactively to this case, and it is respectfully urged that they should not be, then those criteria should not be enforced in their full rigor and the Court should be content with that appropriate degree of compliance which may be exacted without destroying the effectiveness of the wiretap investigative device 65

C. The wiretap order and the manner of its execution were not violative of Fourth Amendment standards 73

POINT III—Even if Section 605 of the Federal Communications Act be viewed as barring the use of wiretap evidence in state criminal trials, that is not a valid ground for vacating the judgment of conviction in this case, because the recent enactment by Congress, after the granting of certiorari herein, of the Omnibus Crime Control and Safe Streets Act of 1968 abated and rendered inoperative the provisions of Section 605 79

PAGE

POINT IV—Even if it be assumed, *arguendo*, that the Fourth Amendment governs the use of wiretap evidence of the type here in issue, this Court should not give retroactive application to its decisions in the *Berger* and *Katz* cases so as to invalidate the judgment of conviction in this case. Further, the Court should not apply *Lee* v. *Florida* retroactively so as to reverse the conviction herein 80

POINT V—The introduction in evidence of the wiretaps here in issue was not violative of the Ninth Amendment and that Amendment does not establish a right of privacy enforceable in the circumstances of this case 91

A. The Ninth Amendment does not protect telephonic privacy 91

POINT VI—The Due Process Clause of the Fourteenth Amendment affords no basis for reversal of the judgment of conviction 103

A. The Due Process Clause of the Fourteenth Amendment does not protect a pure due process right of privacy independent of the specific guarantees of the Bill of Rights 103

B. This Court should refuse to find an absolute right of privacy as against law enforcement in the Due Process Clause of the Fourteenth Amendment because such a right is indefensible on either philosophical or practical grounds 116

C. Even if it be conceded, *arguendo*, that the Due Process Clause of the Fourteenth Amendment protects a right of telephonic privacy, that right is subject to regulation under the police power of the State 123

PAGE

D. Even assuming, *arguendo*, that the Due Process Clause of the Fourteenth Amendment secured to petitioner a substantive right of telephone privacy and further assuming that the wiretapping in question violated that right, petitioner still can not obtain reversal of the judgment of conviction because the Due Process jurisprudence of this Court does not require exclusion of the wiretap evidence in circumstances such as these 127

POINT VII—Petitioner may not invoke the Fifth Amendment as the source of a right of telephonic privacy 132

POINT VIII—The wiretapping here in question was not violative of petitioner's First Amendment rights nor does a statute permitting court-authorized official wiretapping offend against the First Amendment 134

POINT IX—Petitioner's contention that the trial prosecutor erred in referring to his inculpatory recorded telephone conversations as confessions is a mere terminological quibble and does not present a meritorious claim of constitutional proportions 142

POINT X—Petitioner's anti-wiretap philosophy is offensive to the canons of empirical inquiry and analytical reason and exhibits the intellectual vice of the partial view 146

CONCLUSION 160

Table of Cases Cited

	PAGE
Abrams v. United States, 250 U.S. 616	137
Adler v. Board of Education, 342 U.S. 485	136
Bailey v. Anderson, 326 U.S. 203	77
Baker v. Libbie, 210 Mass. 599, 97 NE 109	54
Barenblatt v. United States, 360 U.S. 109	136
Bates v. Little Rock, 361 U.S. 516	124
Beauharnais v. Illinois, 343 U.S. 250	137
Breard v. Alexandria, 341 U.S. 622	104, 136
Breithaupt v. Abram, 352 U.S. 432	110, 131
Brinegar v. United States, 338 U.S. 160	74
Brown v. Board of Education, 347 U.S. 483	48, 157
Brown v. United States, 276 U.S. 134	69
California v. Hurst, 325 F. 2d 891	70
Camara v. Municipal Court, 387 U.S. 523	66
Chaplinsky v. New Hampshire, 315 U.S. 568	137
Chicago Life Insurance Co. v. Cherry, 244 U.S. 25	146
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371	89
Clinton v. Virginia, 377 U.S. 158	43, 86
Cole v. Arkansas, 338 U.S. 476	110
Cox v. New Hampshire, 312 U.S. 569	137
Debs v. United States, 249 U.S. 211	137
Dennis v. United States, 341 U.S. 494	48, 136, 137, 157
De Stefano v. Woods, 12 L. ed. 1308, decided June 17, 1968	87
Evans v. United States, 242 Fed. 2d 535	73
Feiner v. New York, 340 U.S. 315	137
Frohwerk v. United States, 249 U.S. 204	137
Gibson v. Florida Legislative Comm., 372 U.S. 539	137
Gilbert v. Minnesota, 254 U.S. 325	137
Giles v. Md., 386 U.S. 66	132
Gitlow v. New York, 268 U.S. 652	137
Goldstein v. United States, 316 U.S. 114	79
Griswold v. Connecticut, 381 U.S. 479	93, 94, 95, 96, 98, 99, 101, 106, 107, 108, 109, 111, 114, 124

PAGE

Hamm v. Rock Hill, 379 U.S. 306 ..... 26, 80
Harlem Check Cashing Corp. v. Bell, 296 U.S. 15 81
Hester v. United States, 265 U.S. 57 70
Hoag v. New Jersey, 356 U.S. 464 ..... 110, 146
Hoffa v. U.S., 385 U.S. 293 133
Home Building and Loan Association v. Blaisdell, 290 U.S. 398 58
Hurtado v. California, 110 U.S. 516 110

Irvine v. California, 347 U.S. 128 ..... 110, 111, 112, 127, 128, 129, 130

International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 136

Jenkins v. Dell Publishing Co., 143 Fed. Sup. 952, aff'd 251, Fed. 2d 447, 3rd Circuit, cert. den. 357 U.S. 921 118
Johnson v. New Jersey, 384 U.S. 719 88
Johnson v. United States, 293 Fed. 2d 539, D.C. Cir., cert. den. 375 U.S. 888 ..... 70, 87
Jones v. United States, 362 U.S. 257 71

Katz v. United States, 19 L. ed. 2d 581 ..... 41, 42, 43, 44, 46, 47, 49, 50, 52, 63, 65, 66, 72, 75, 76, 80, 87, 91, 93, 102, 153

Kay v. U.S., 303 U.S. 1 ..... 110, 145
Ker v. California, 374 U.S. 23 71
Kovacs v. Cooper, 336 U.S. 77 104

Lanzetta v. New Jersey, 306 U.S. 451 ..... 110, 145
Linkletter v. Walker, 381 U.S. 618 88
Lopez v. United States, 373 U.S. 427 86

McDonald v. U.S., 355 U.S. 451 45
McLaughlin v. Florida, 379 U.S. 184 124
McNabb v. United States, 318 U.S. 332 146
Mapp v. Ohio, 367 U.S. 43 ..... 128, 130
Martin v. Struthers, 319 U.S. 141 154
Melvin v. Reid, 112 Cal. App. 284, 297, P. 91 53
Meyers v. Nebraska, 262 U.S. 398 105
Miller v. Pate, 360 U.S. 264 ..... 128, 131

PAGE

Miller v. United States, 357 U.S. 301 71
Monroe v. Pape, 365 U.S. 167 47
Mooney v. Hollahan, 293 U.S. 103 ..... 128, 131
Morrison v. Cal., 291 U.S. 82 132
Murchison, in re, 349 U.S. 133 132
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291 77

N.A.A.C.P. v. Alabama, 357 U.S. 449 ..... 137, 138
Napue v. Illinois, 360 U.S. 264 131
Nardone v. United States, 308 U.S. 338 83

Olmstead v. U.S., 277 U.S. 438 ..... 98, 133
Onlee v. U.S., 343 U.S. 747 45
Osborn v. United States, 384 U.S. 323 ..... 68, 78

Palko v. Connecticut, 302 U.S. 319, 82 L.ed. 288 146
Pavesich v. New England Ins. Co., 122 Ga. 190, 50 SE 68 53
People v. Broady, 5 N.Y. 2d 500, cert. den. 361 U.S. 8 85
People v. Cohen, 18 N.Y. 2d 650, cert. den. 385 U.S. 976, reh. den. 385 U.S. 1032 85
People v. Dinan, 11 N.Y. 2d 350 ..... 82, 85
People v. Letterio, 16 N.Y. 2d 307 52
People v. McCall, 17 N.Y. 2d 152 68
People v. Massee, 38 Misc. 2d 403 (N.Y.) 73
Pierce v. Society of Sisters, 268 U.S. 310 105
Pub. Utilities Comm. v. Pollak, 343 U.S. 451 ..... 105, 154
Pugach v. Dollinger, 365 U.S. 458 ..... 81, 82, 85, 86, 92
Pyle v. Kansas, 318 U.S. 213 131

Roberson v. Rochester Folding Box Co., 171 N. Y. 583 101
Rochin v. California, 342 U.S. 165 ..... 110, 111, 112, 127, 129, 130
Rochin v. California, 347 U.S. 165 44
Rose v. United States, 274 Fed. 531 73
Roth v. United States, 354 U.S. 476 136
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Schaefer v. United States, 251 U.S. 466 137
Schmerber v. California, 384 U.S. 757 ..... 110, 128, 129, 131, 133

PAGE

Schwartz v. Texas, 344 U.S. 199 ..... 81, 83
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Spencer v. Texas, 384 U.S. 554 144
Stanford v. Texas, 379 U.S. 476 68
Steele v. United States, No. 1, 267 U.S. 498 68
Stemmer v. New York, 336 U.S. 963 81
Sweezy v. New Hampshire, 354 U.S. 234 136

Time, Inc. v. Hill, 87 Sup. Ct. 534 118
Tot v. U.S., 319 U.S. 463 132
Travers v. Paton, 261 Fed. Supp. 110 115
Tumey v. Ohio, 273 U.S. 510 132

United States v. Barone, 330 Fed. 2d 543 70
United States v. Darby, 312 U.S. 100 92
United States v. Eisner, 297 Fed. 2d 595, 6th Cir., cert. den. 369 U.S. 859 70
United States v. Fleming, 69 F. Supp. 252 55
United States v. Gaitan, 4 Fed. 2d 848 73
United States v. Goldman, 118 F.2d 310 115
U.S. v. Guest, 383 U.S. 745 47
United States v. Howard, 138 Fed. Supp. 376 70
United States v. Howell, 240 Fed. 2d 149 69
U.S. v. Lee, 274 U.S. 563 ..... 45, 86
United States v. Old Dominion, 10 Fed. 2d 736 69
U.S. v. Price, 383 U.S. 787 47
U.S. v. Romano, 383 U.S. 136 132
United States v. Rumley, 345 U.S. 41 136
United States v. Ventresca, 380 U.S. 102 74
Uphaus v. Wyman, 360 U.S. 72 136

Watkins v. United States, 354 U.S. 178 136
West Coast Hotel v. Parrish, 300 U.S. 379 ..... 123, 124
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York v. Stacy, 324 F. 2d 450 (9th Cir.) cert. den. 376 U.S. 939 47

Zap v. United States, 328 U.S. 624 69

Statutes Cited

PAGE

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First Amendment 2, 35, 36, 37, 58, 109, 111, 113, 118, 134, 136, 137, 138, 140, 141, 142

Fourth Amendment 1, 2, 19, 21, 22, 23, 24, 25, 40, 41, 42, 43, 44, 45, 50, 51, 53, 54, 56, 61, 63, 65, 66, 67, 79, 81, 85, 86, 87, 88, 90, 91, 92, 93, 95, 103, 104, 105, 109, 110, 112, 128, 130

Fifth Amendment 2, 19, 92, 105, 109, 111, 132, 133

Ninth Amendment 2, 28, 30, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 107, 109, 111

Tenth Amendment 92, 97, 100

Article IV 95

Article V 23

Fourteenth Amendment 30, 31, 32, 35, 58, 83, 96, 106, 110, 112, 113, 114, 116, 123, 127, 131, 132, 144, 145

FEDERAL COMMUNICATIONS ACT:

Section 605 .....2, 19, 26, 40, 41, 45, 79, 82, 83, 85, 86, 87, 88

CODE OF CRIMINAL PROCEDURE:

Section 813-a 25, 67, 90, 110, 157, 158

NEW YORK CONSTITUTION:

Article I, Section 12 .....25, 29, 67, 96

USC 1983, 1985 47

PENAL LAW OF THE STATE OF NEW YORK:

Section 738 77

Section 1423, subdivision 6 85

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IN THE

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No. 62

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Questions Presented

1. Should this Court hold that an official wiretap interception of a telephone conversation is within the regulatory ambit of the Fourth Amendment where the interception does not involve physical contact with or electronic penetration of a place or structure in which a party to the conversation is located?

2. Even if it be assumed that such a wiretap interception of a telephone conversation is a search and seizure within the meaning of the Fourth Amendment, can petitioner invoke the provisions of that Amendment where his telephone conversations were conducted with a co-conspirator located in a public bar at a telephone that was not enclosed by a telephone booth and on a telephone line which had an extension and two portable telephone instruments?

3. Even assuming that such official wiretapping is within the governance of the Fourth Amendment, enforceable against the states through the Fourteenth Amendment, should this Court hold that the use of wiretap evidence herein was violative of Fourth Amendment standards?

4. Can petitioner rely upon Section 605 of the Federal Communications Act as a vehicle of protection where that section has been repealed by the federal Safe Streets Act, or was Section 605 abated and made inoperative by such repeal and rendered unavailable as a ground of relief?

5. Even if it be assumed that Fourth Amendment standards govern the use in a state criminal trial of wiretap evidence such as that involved in this case, should this Court give retroactive application to its decisions in the *Berger* and *Katz* cases so as to invalidate the judgment of conviction in this case? And assuming Section 605 did not abate, should the Court give retroactive application to its decision in *Lee* v. *Florida* so as to reverse the judgment of conviction herein?

6. Does the First, Fifth or Ninth Amendment or the due process clause of the Fourteenth Amendment protect a right of telephonic privacy, did the use of the wiretap evidence herein violate such a right, and, assuming, *arguendo,* and contrary to fact, that it did, is such a violation ground for reversal of the judgment of conviction herein?

7. Is petitioner's contention that the trial prosecutor erred in referring to petitioner's inculpatory recorded telephone conversations as confessions a mere terminological quibble in view of the dramatically incriminatory nature of those conversations and can the prosecutor's references be said to constitute official behavior so shocking to the civilized sense of justice that it falls below the minimum standard of due process and amounts to a deprivation of substantial rights so serious as properly to invoke the majestic processes of our high constitutional court?

Preliminary Statement

In the Court below and in the Brief in opposition to the petition for a Writ of Certiorari in this Court, The People of the State of New York have been represented by the District Attorney of Nassau County with Assistant District Attorney Henry P. De Vine, of counsel. In this Brief, Assistant District Attorneys George D. Levine and Henry P. De Vine appear of counsel. The Statement of the Case in this Brief was written by Assistant District Attorney Henry P. De Vine. Section C of Point II in this Brief was written by Assistant District Attorneys George D. Levine and Henry P. De Vine. The remainder of this Brief, including Sections A and B of Point II and all of Point I and Points III through X, were conceived and written by Assistant District Attorney George D. Levine.

Statement of the Case

The Evidence

Sometime in 1958, Joey Gallo, an infamous Brooklyn gang leader tried to extort a substantial sum of money from Irving Holzman (1496; 1502). Holzman (1016, *et seq.*) had in his employ at the time one Joseph Albino who was the long time friend of Rocky Graziano, the prize fighter. Albino volunteered that if Holzman contacted Rocky Graziano the matter might be resolved. Holzman did just that and Graziano recommended that Salvatore Granello, a/k/a Sally Burns, was the man who could settle the controversy. Holzman thus meets Granello for the first time.

Sure enough, just as Albino predicted, the Gallos were called off whereupon Granello then announced that Holzman owed him $3,500 for his efforts.

According to Holzman (1502, *et seq.*), he gladly paid the $3,500 without complaining to the authorities out of

fear for the Gallos. How the $3,500 was divided up between Granello and the Gallos remains one of the mysteries of the decade.

In point of time, the next significant event occurred in 1963 when the appellant, Thomas R. Kaiser, purchased a bar and grill in the Jamaica-Richmond Hill area in connection with which he borrowed a sum of money from Holzman who owned the juke box and shuffle board then in the premises. In return for the loan, Kaiser signed a contract with Holzman, continuing the Holzman machines in the newly purchased bar.

The contact with Holzman was made by Kaiser through Robert Luttman, an employee of Holzman, and the arrangement was typical of those prevailing in the coin machine industry in Metropolitan New York (999-100).

Kaiser, admittedly was a long time friend of Dino Conte, who managed or hung out in the Headline Lounge on 43rd Street in Manhattan. It was Conte who introduced Kaiser to Granello in April of 1964 at the Headline Bar. According to Kaiser, he knew Granello as Sally Burns (1887).

In May of 1964, Conte brought up Holzman's name in a conversation and quizzed Kaiser regarding Holzman's private life, his business ventures, partners, the extent of his business holding and enterprises, as well as Holzman's overall financial condition (1916-17).

Kaiser maintained that he knew nothing then about Holzman personally or his private business (1901-1903).

The record (*supra*) is quite clear that as a result of this conversation with Conte and probably at Conte's urgings, Kaiser used his friendship with Robert Luttman, Holzman's trusted employee, to ferret out the information clearly proving that Irving Holzman by 1964 possessed a very substantial investment in the coin machine industry in the greater New York area. The result of the Kaiser prob-

ings established that Holzman was a man of very considerable means. Indeed, Holzman was now placed in the million dollar class by the conspirators.

Kaiser frankly conceded he knew Granello was then contacting Holzman (1922), although he steadfastly denied that he had guilty knowledge that Granello and Conte were using the intelligence gained by Kaiser from Luttman and passed by Kaiser to Conte, to extort $25,000 for the "family" and 25% of Holzman's business for themselves.

The Corpus Delicti

For the reason that Kaiser does not claim that *no* crime occurred or that *no* offense or wrong was committed by Granello or Conte, we shall go directly to the principal items of evidence relied upon to spell out the attempt by Granello to extort $25,000 cash from Holzman and to cut himself in for a quarter of all of Holzman's business.

The prosecution resorted in the first instance to the testimony of the victim, Irving Holzman, (991, *et seq.*) who testified he was both a distributor as well as an operator of coin operated equipment in the Bronx, Manhattan, Kings, Queens, Nassau and Suffolk Counties.

Sometime during the morning of June 4, 1964, Conte came to Holzman's New York office where he introduced himself as a partner of Granello and told Holzman that Granello wanted to see him. Holzman replied if Burns wants to see me, tell him to stop by the office.

Granello phoned Holzman and agreed to have lunch with Holzman at his New York office, but the luncheon never came off.

The weekend came and went and on Monday, June 8, 1964, Holzman left his home in Roslyn as was his custom for his New York office. While on the way to the City, his

wife was assaulted in her Roslyn home by a gang of young toughs posing as delivery men.

The fact of the attack was testified to by Holzman's wife, Ruth (533, *et seq.*), and a neighbor, Ann Rettek (522), who, while walking the dog, saw the attackers and heard Mrs. Holzman's screams for help in her home.

When Holzman arrived at his New York office, he was notified of the assault on his wife and returned immediately to his residence in Roslyn. It was at this point that Holzman learns that Granello has been looking for him so he telephoned Granello who told him that he would not talk to him on his home phone, but that he should go to an outside phone and call him back which he did (1034).

Granello told Holzman that he wanted to see him and that they could have lunch at Charles French Restaurant which Holzman refused to do because of the assault on his wife.

According to Holzman, he now became suspicious, first because Granello suddenly reappeared in his life, and then his wife is mysteriously beaten; so he called Granello and agreed to meet him at Charles French Restaurant that same Monday afternoon.

The meeting took place and Granello immediately volunteered that he learned about Mrs. Holzman's beating from a radio report on the way back to New York Monday morning from his summer place at Greenwood Lake. Further, that if he, Granello, had returned on Sunday (1039):

> "I could have avoided this whole thing because the people I am with are animals."

Continuing Holzman testified Granello declared (1039, 1041, 1041):

> "'You know, I hear that you grew into the million dollar class and nobody who gets in that class doesn't have somebody with him.'

He says, 'Even Costello had to give up a piece.'

Q. Did he say who he meant by Costello? A. No, but I assumed that he was talking about Frank Costello. That's the way it sounded.

Q. He said even Costello had to give up a piece? A. Yes.

Q. Go ahead. A. Then he says to me, he tells me that it was me, it wasn't my wife that people came into the house for and gave her that beating, it wasn't my wife they were looking for, *it was me.*

He says, 'They were looking for you' and he says, 'There are certain people who think they should have a piece of you and I figured out that—'

Mr. Bouse: I move it be stricken.

The Court: This is the conversation.

Q. This is Granello saying? A. Yes.

The Court: Overruled.

Q. In other words Granello figured out?

Mr. Bouse: Oh, I didn't understand that this is Grannello who figured it out.

Q. This is his actual words? A. Yes, he said, *'I figured out the best thing you do, you come up with $25,000 in cash for the family'* and he says, *'I don't talk about the family to everybody.* I am talking to you about it because I trust you with anything and then *you will give me 25% of all your business,'* and he says, *'I don't mean by building an equity of 25% and I don't mean of a small percentage,'* he says, *'Becaus Sally Burns pisses away 100 a day'.''* (Italics mine.)

Holzman replied that he would have to think it over; that he had a partner and he could not understand why he had to give $25,000 to some "family" or take in a partner. As Holzman left the restaurant, he saw Conte at the bar drinking with a redhead.

Holzman now knew he was in real trouble so he immediately reported the threat by Granello to the Nassau County authorities (1043), and with Holzman's permission, Holzman's home phone was monitored.

Pursuant to direction, Holzman called Granello who again advised Holzman to call from an outside phone which Holzman agreed to do. The phone in question was a public pay phone in the Oak Pharmacy nearby the Holzman residence in Roslyn. The calls made from Holzman to Granello from the public pay booth in the pharmacy were all monitored with Holzman's consent. Pursuant to Police direction, Holzman repeated that he would not give $25,000 to the "family".

Conte then called Holzman at Holzman's home and told him to call Granello again, and between Granello and Conte they advised Holzman that Granello could be reached at Patrissey's a restaurant on Mulberry Street in downtown New York or at the Headline Bar.

Holzman pursuant to Conte's direction, then phoned Granello at the Headline Bar to tell him that he could not then meet Granello because of his wife's fear and physical condition resulting from the beating. Holzman stayed in his home through the weekend which takes us up to Monday, June 15, 1964, when he went to New York where he met Granello for a second time at his New York office. Holzman was then being shadowed by the captain of his pleasure boat, who Holzman pretended was a detective. Holzman again told Granello that he did not need any partner and would not give Granello $25,000. According to the witness, Granello agreed to reduce Holzman's contribution of $25,000 to the "family" to $12,500 with the promise that Granello would make up the difference if Holzman would make Granello a 25% partner in all of his business ventures. Holzman refused.

On Thursday of the same week, June 18th, Holzman met Granello again in his New York office, and Granello demanded then and there $5,000 for the "family" by Friday night to show the "family" good faith (1215-1219).

The ruse then being carried on by Holzman with regard to Captain Ambler, his boat captain, had by now been discovered by Granello, and Granello advised Holzman that he did not need a detective as he could straighten everything out (1217).

Holzman testified at this point he was truly frightened of Granello and was stalling as long as he could, but Granello kept insisting on the $5,000 for the "family" (1223).

On the following Monday, which would be June 29, 1964, Granello phoned Holzman at his home and Mrs. Holzman answered. When she realized it was Granello, Mrs. Holzman declared that if he did not leave them alone, that she was going to the Federal Bureau of Investigation.

By now, it was becoming obvious to Granello that Holzman was no easy pickings so on the very next morning, Holzman's married daughter, Dolores Billing (939, *et seq.*), who resided with her husband, Ronald in Plainview in the Town of Oyster Bay, received a telephone call and was threatened (953).

> "If your father doesn't cooperate we'll come to Sylvia Lane and kick your fuckin' pregnant belly in."

Thereafter, there were a whole series of calls between Holzman and Granello wherein Granello tried to induce Holzman to come to New York City to talk, which, of course, Holzman did not fall for.

It was at this juncture that Holzman's New York office was bugged with Holzman's consent, and a meeting with Granello was held on Monday, July 2nd.

The tape recording of the bugged conversation was transcribed by an official Grand Jury stenographer and copies were made available to each member of the jury as well as defense counsel and the judge so that all could follow the playing of the tape in the courtroom. The tape itself was People's Exhibit 7 whereas the transcript is People's Exhibit 7A. The tape recording as played for the jury was recorded and will be found in the record on appeal starting on page 1283. The tape conversation demonstrates clearly and unequivocally the nature and quality of the pressure that Granello was bringing to bear on Holzman. It is shot through with innuendo and inference that is susceptible of only one conclusion, and that is, Holzman should pony up the $25,000 for the "family" as well as make Granello his partner.

For example, when Holzman tells Granello that his associate, Joey Albino, does not want a partner, Granello replies that he told Rocky Graziano to speak to Joey Albino (1286; 1328-1329).

Any doubt or curiosity remaining regarding the true meaning and intentions of Granello are cleared up conclusively by People's Exhibits 9 and 9A, a taped telephone conversation and typewritten transcript thereof between Conte and Kaiser regarding the beating of Albino, the Holzman ally.

Even more enlightening was the bugged conversation of the meeting between Granello and Holzman in Holzman's New York office wherein Holzman attempts to find out from Granello what "family" is coming into his business, uninvited and for free with Granello. The tape and transcript thereof are People's Exhibits 7 and 7A, respectively.

Granello in what could easily be an Amos-Andy dialogue, if it was not for real, does not want to reveal the

"family" in question. Holzman is told outright by Granello (1294):

> "No, you can't know that * * * that's impossible, you can't know because, uh, no matter what happens you can't know * * *."

It appears that at times Granello himself becomes desperate undoubtedly because he has made certain promises to the "family" regarding Holzman that now seem to be slipping through his grip. For example, Granello reminds Holzman that (1300):

> There are people from the past that felt that they have interest in you * * * and there's more than one person, and I'm not going to mention their names * * *."

Granello of all things then agrees to put up one half of the $25,000 going to the "family" if Holzman will only capitulate.

Holzman, of course, now wants to know why Granello suddenly will pick up one half of the tariff going to the "family". Granello replies (1313):

> "This would clear the road for me to be with you; not that I am paying a shake to be with you. I don't * * * but in this instant, the people that are involved, I want to clear them up and they have no interest in you, and there can be no further bullshit or nonsense, and this is not a sha- you may look at it as a shake. You say what am I paying? What are they giving me?"

The great trouble is Granello couldn't or wouldn't answer his own questions about "they".

The reason for Granello's hesitancy, if not fright, appears in the very next exchange. Holzman inquires of Granello (1314):

> "Is this got anything to do with this, with this guy with the cigar over in Woodside, over in Corona, or wherever it is?"

Granello replies (*supra*):

> "Don't ask, don't ask me that. Don't ask me these questions. I'm not going to answer them."

The man "with the cigar over in Woodside" is none other than Mike Miranda, a consigliere in the Vito Geneovese "family". The reason Holzman confronted Granello with Mike Miranda is because Dino Conte on June 4th, when he first contacted Holzman, brought Mike Miranda into the situation (1347-1348).

So it was that Holzman, probing to learn the identity of the "family" about to extort $25,000 in cash from him and muscle in on his business, said to Granello (1314):

> "When your man, Dino, was here * * * he mentioned that—uh—Miranda situation."

At the mere mention of Mike Miranda's name, Granello replied (1314):

> "Listen, I don't—I don't want you to ask me no, none of them kind of questions. I'm just going to tell you one thing; and I'm going to tell you; don't mention nobody's name. I don't want nobody's name mentioned."

It is perfectly obvious why Granello does not want "nobody's name mentioned". "Nobody" is Mike Miranda of the Vito Geneovese family.

In Cuba, Granello, according to Granello, was the "jefe" or "boss" (1315-1316), but the suspicion looms large that in Corona or Woodside, Granello's posture with the "family" is slightly different.

Holzman finally closed the door forever when he telephoned Granello at Patrisseys on Mulberry Street. A tape and transcript, People's Exhibits 8 and 8A corroborate beyond all doubt Holzman's testimony that Granello's efforts were nothing less than an attempt to extort $25,000

from him for what was probably the Vito Geneovese family through Mike Miranda, a consigliere, plus 25% of Holzman's business.

Numbers 1 and 2 appearing on People's Exhibit 8A are the voices of Holzman and Granello respectively. Of course, the court's attention is directed to the entire transcript, although the flavor is revealed by this brief exchange (1376-1377):

> "1—we're not going to take in any partners, and I can't take in any partners—
>
> "2 O.K., buddy.
>
> "1—in this business.
>
> "2 Now, I'm going to tell you something—
>
> "1 Yeah.
>
> "2—see. Now I'm going to tell you something, See, Irving see, you used me pretty good and, uh, uh, now, I'm going, I'm going to tell you something and you could do what you want, go whichever way you want. And it ain't a threat. It's a fact, see. Uh, if you think you're going to play with me you're making a big mistake. Now I tried to work out everything the way you want it, but I see you're taking like an inch at a time. I want to extend myself, but if that's the way it's going to be then you better go and get who you going to get. Understand what I mean? Go to the, uh, Cahn or the FBI or whoever you want 'cause *you're going to need them.* Do you understand that? Do you hear me?
>
> "1 Yeah, I hear you.
>
> "2 O.K. And, uh, if you think you're going to use me and you're going to play games with me, you ain't capable, see. You may think you are, and I'm trying to be nice, but I could see with you that there's only one way with you and *I am just going to unleash the people and let them do what the fuck they want with you,* you understand? Because I could see what it is with you, see. And you want to play with me that way, which you shouldn't do, and I told you not

to do it. You wanted—*now you've incurred my wrath*, you see. And we'll see who's going to come out on top. Because *anybody that's associated with you is going to wind up in the fuckin' hospital. And you'll see a fury that you never saw in your life and this is coming from Mr. Burns himself.* You understand?

"1 Yup.

"2 So when you, when you going to tell your people, you tell them that it's from me. You understand, Irving?" (Italics mine)

The Kaiser's Involvement

There can be no doubt that as between Granello, Conte and Kaiser, Granello was the "jefe", Corona notwithstanding. Nevertheless, it is clear beyond cavil that Kaiser was a knowing participant in the efforts of Granello and Conte to extort $25,000 from Holzman and to cut themselves in for 25% of Holzman's business ventures.

Proof of this fact stems principally from two telephone conversations between Kaiser and Conte which were intercepted and recorded from the phone at the Headline Lounge. The transcripts in question are People's Exhibits 9A and 9B.

These exhibits constitute the essential proof that Kaiser well knew the purpose for and manner in which the information acquired by him from Bob Luttman was being used by Conte and Granello.

Kaiser is calling in both cases from Kitty City in the old Flushing Meadow area where Kaiser apparently worked as some kind of guard or bouncer.

The voices on both transcripts are numbered 1 and 2. In each case, the numerals represent Kaiser and Conte, respectively.

We shall, for the further convenience of the Court, give a short summary of both conversations.

Exhibit 8A

The conversation opens with a discussion of the possibility that Joey Albino, Holzman's aid, might have been threatened or beaten by Granello who is referred to throughout both conversations as "Sally" or "the man", and the conclusion is it would have been wrong for Albino to have been assaulted.

Suddenly, Kaiser volunteers that:

> "There's no question McGloyne's still alive. He's over here [Kitty City] with his whole fucking gang of kids."

Conte and Kaiser then turned the discussion to the efforts to extort the $25,000 from Holzman and to get a piece of Holzman's business, and both agree that the conspiracy should be abandoned because Sally handled the operation badly. There can be no doubt that Kaiser was thoroughly disgusted with the methods resorted to by Sally and the crude way that Sally used the secret information acquired by Kaiser from Bob Luttman, an employee of Holzman. Kaiser's concern developed over the fact that Holzman would have to be a moron not to suspect that it was Bob Luttman who was feeding the information on Holzman that Sally used to make his criminal judgments.

Kaiser obviously had wanted to protect Luttman from Holzman and was upset because he believed that Luttman would be fired.

Kaiser then complained that:

> "If it [the shake] would have been handled the way I told you in the fucking beginning, it would have been done and it [the extortion] would have been over with now."

Kaiser was obviously bitter because Sally did not, as he suggested, bring:

> "in an outside element like I told him to * * * to straighten it out, instead of just walking in there, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last."

Both Kaiser and Conte were of a mind that the attempts to extort the money from Holzman should now be dropped, but it then appears that Kaiser exercised a second thought and suggested:

> "What I would do is maybe wait a month."

Conte obviously disagreed, and they went back to the subject of who was to blame for blowing the criminal efforts to extort $25,000 for the "family" and to get 25% of Holzman's business. Both Kaiser and Conte disavow any responsibility. Indeed, Kaiser declares:

> "It wasn't handled by me badly, * * * the fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly."

Boasting a little bit, Kaiser then stated:

> "I brought, I brought, the man over a shot for you and for him * * *."
>
> "So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong."
>
> "Well, well, let him go to Cahn. Because there's nothing they can do cause Sally's forgetting about it."

Apparently, Kaiser and Conte believed that with the abandonment of the conspiracy by Granello, there was no criminal liability and that no violation occurred unless the money had been paid.

People's Exhibit 9B

The second conversation is as truly bizarre as any that has come to the attention of this office in this decade. For in it, Kaiser and Conte discuss, amongst other things, the selection of a new and different "victim" who might satisfy their criminal greed. On this score, the Court is referred to the following exchange between Kaiser, again speaking from Kitty City, in the Douglaston area, to Conte at his bar in the Times Square area of Manhattan.

> "Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place [Kitty City]. Well, fine one. Jesus, I'm starving over here. Pulling out of this fucking driveway here. Find a victim there. That's for sure. Sure, we got to find a victim. Now, we, we lost Holzman so now we got to find another victim. Find somebody else out there. Well, we'll see what else come up. Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks. Well, just be careful now, that's all, be fucking careful."

Kaiser and Conte then talk about "this thing that time on Park Avenue" and Kaiser brought up the subject of "Max Factor" the manufacturer of cosmetics, as he referred to the fact that when he was in a drug store, and:

> "I saw a picture of Max Factor. * * * I wonder if he's got any money. * * * He's, he's pretty big in that business, too, you know. * * * When I come over I'll tell you about it what this guy told me."

They then discussed the fact that Holzman was "fucking terrified" and staying in his home and not coming to New York.

As a matter of fact Conte remarked that Holzman "can never walk into New York again he knows that."

They also discussed the fact that Sally flew to Chicago to see a "Lyn Durant" about Holzman.

Continuing they discussed the fact that Holzman will not be able to hold the operating part of his business, that is, the Routes unless he services the equipment in the various bars and grills throughout Metropolitan New York, and this he cannot do while he is buttoned up in his home. Further, that they believed that this is what Sally now has in mind.

Both Kaiser and Conte then discussed the money that Holzman paid to Granello because of the "Gallo business". Kaiser then remarked that Sally was "terrorizing" Holzman.

> "He told him uh, he says, 'I'll guarantee you you can't come to New York'."

This then is the general flavor of the conversation between Kaiser and Conte.

It is little wonder then why in the face of the evidence, not merely out of the mouth of the victim, but the taped conversations, that Conte and Granello plead guilty. Indeed, it is rare in this day to encounter a cruder attempt to extort $25,000 and 25% of a man's business than the evidence reflected by the proof in this trial.

SUMMARY OF ARGUMENT

POINT I

In Section A, Respondent argues that there is no merit in petitioner's contention that Section 605 of the Federal Communications Act created an enclave of telephonic pri-

vacy protected by the Fourth and Fifth Amendments beyond the power of government to invade even under the authority of a Warrant. Respondent contends that wire tapping is not within the governance of the Fourth Amendment, and that, even if it were, a mere statutory enactment cannot work an alteration in the provisions of the Fourth Amendment so as to bring a new protected class within its scope while, at the same time, exempting that class from the Warrant provisions, which, by the clear terms of the Fourth Amendment, are applicable to all protected classes within the shelter of its safeguards. The exclusive method of constitutional amendment is set forth in Article V of the Constitution, and that Article does not permit amendment by mere legislative act. Moreover, Section 605 was repealed and can no longer serve as a vehicle of protection.

In Section B, Respondent respectfully urges that this Court limit the *Katz* rule to its special facts and hold that a non-trespassory wiretap interception of a telephone conversation is not a search and seizure within the control of the Fourth Amendment. Respondent fears that a contrary decision might render constitutionally suspect all other privacy invading investigative devices and might induce State and federal courts, acting upon the doctrinal implications of such a holding, to decree that all proof obtained by privacy invading investigative devices is inadmissible in evidence unless secured under the authorization of a Warrant valid under Fourth Amendment standards. Respondent prays that this Court limit the scope of the *Katz* rule to electronic eavesdropping which involves *some physical contact* (whether amounting to trespass or a penetration or not) with the structure in which is occurring the conversation overheard. Such a decision would constitute a natural doctrinal progression from existing precedent.

If the *Katz* doctrine is not so confined in this case, the Court's decision herein may exercise a constraining effect on the activities of law enforcement officers mindful of the possibility that the Court's pronouncement may give a pre-

text for civil suits or criminal prosecutions against public officials under the federal civil rights laws for invasions of privacy. If the Court's decision in this case should reflect a broad conception of privacy, it may well encourage a massive outpouring of damage suits and injunction actions against federal and local governments and officers based upon every conceivable invasion of every personal interest which has ever been classified under the vague concept of privacy.

If law enforcement officers are compelled to obtain warrants before employing privacy invading investigative techniques, law enforcement will be dealt a fatal blow, since such techniques are usually invoked at a time when there is insufficient evidence to make out a showing of probable cause. Indeed, such techniques are utilized in order to obtain sufficient proof to enable the procurement of search warrants and eavesdrop orders. It would be impossible under such a strict system of legal control to deal effectively with organized crime.

It is respectfully urged that even the limitation on the *Katz* doctrine contained in the concurring opinion of Mr. Justice Harlan would create a legal regime involving certain disadvantages to law enforcement that might be avoided by a doctrinal formulation such as that prayed for by respondent.

If this Court places its imprimatur of approval on a broad principle of privacy, there may, as a consequence, be visited upon the American system of criminal justice tasks and burdens beyond its capacity to assume. Lower courts, by a bold course of inference, might deduce the conceptual consequences of the Court's full-blown statement as protecting all conceivable official invasions of interests generally grouped under the vague rubric of privacy. Moreover, the proliferating nuances of an expanding right of privacy would multiply pre-trial motions and hearings in State and

federal courts and provide innumerable additional pretexts for the invocation of the federal habeas corpus remedy, thus imposing impossible strains on State and federal systems of criminal justice.

If the Court should apply the *Katz* doctrine to this case so as to hold or imply that the Fourth Amendment does not merely safeguard protected areas, but, more, preserves the privacy of the accused against privacy invading investigative techniques, the Fourth Amendment's protective dimension would be enlarged far beyond traditional boundaries and the rule of standing which is still recognized in this Court's Fourth Amendment jurisprudence, albeit in somewhat relaxed form, might fall by implication.

That such might be the results of a magisterial pronouncement of doctrine which aggrandizes the regulatory grasp of the Fourth Amendment is suggested by the history of criminal justice in this country. The catalytic effect of this Court's decisions produce results beyond its intentions as the implications of its doctrinal formulations are searched out and acted upon by lower courts. Nor will this Court obviate such dangers by a limited exercise in legalistic innovation. A modest advance in doctrine is but preparation for a further advance. The goal which this Court regards as marking the limits of the possible may provide the point of departure for a successor Court, so that, by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement.

Such a persisting attrition of official competence may produce a fundamental alteration in the balance of social forces, such that extra-legal power will no longer wear the aspect of the transient and eccentric, but rather will stand forth as a virulent and ineradicable feature of a permanently flawed society.

Since official wiretapping, state and federal, is now controlled by the federal Safe Streets Act, and, in addition, by State laws, the protection of privacy will not be sacrificed by a holding such as that prayed for by Respondent.

In Section C, Respondent contends that the attempt to justify the extension of the Fourth Amendment's scope to include telephonic privacy by a reference to alleged inherent purposes of the Fourth Amendment is a questionable methodology. History informs us that the Framers formulated the Fourth Amendment in response to restricted evils and that this Amendment was designed to protect domiciliary repose and property rights, rather than that subtle interest of modern derivation sometimes referred to as the right of privacy. The type of interest which the Fourth Amendment was designed to protect is not the same as that sought to be vindicated under the claim that telephonic communication should be conducted without being overheard.

The attempt to argue that the Fourth Amendment's "purpose" was the protection of privacy is a tenuous exercise because the concept of privacy is so vague that it could hardly constitute a coherent purpose. This concept has been applied to a wide variety of dissimilar interests, values and situations and the various interests which have received protection under the rubric of privacy can not be reduced by conceptual analysis to a common doctrinal essence. Thus when it is argued that it is the "purpose" of the Fourth Amendment to protect privacy, we really do not know what is meant by that assertion in concrete terms.

The Fourth Amendment is a provision which had its inception amid the stress of special circumstances. Its plain language bespeaks the limited character of its objectives. It can not be converted from an ad hoc vehicle to an absolute principle by questionable recourse to a fancied underlying "purpose". Such a technique as that

impliedly contended for by petitioner could be used to expand every constitutional guarantee far beyond the limits suggested by its language and history and would result in the continual amendment of the Constitution by judicial fiat in violation of the exclusive amendment procedure set out in Article V of the Constitution.

In Section D, it is respectfully urged that this Court should not declare wiretapping to be regulated by the Fourth Amendment because to constitutionalize this subject is to remove it from the control of the legislative power, to foreclose all future experiment and to prevent the people from dealing with it in accordance with emerging knowledge, changing needs and an altering balance of interests. It is not necessary for this Court to intervene in the field of wiretapping since that field is already effectively controlled by the federal Safe Streets Act recently enacted by Congress.

POINT II

In Section A, respondent argues that the telephone conversations herein *did not occur in a situation of privacy* and thus were not eligible for protection under the *Katz* rule, even if wiretapping were within the regulatory ambit of the Fourth Amendment.

In *Katz,* this Court held that the conversant in the telephone booth who shuts the door behind him is entitled to assume that his conversation will be private. However, the two conversations here in question had occurred between petitioner, speaking from an outside phone, and co-conspirator Dino Conte, speaking from a telephone at the Headline Bar. The telephone tapped at the Headline Bar was *not in a* coin *booth and it had an extension.* The telephone line at that location also had two portable phones. Since the petitioner occasionally worked at the bar on weekends, he certainly knew the nature of the telephone arrange-

ment at the Headline Bar, and he must have been aware that his telephone calls to the Headline Bar could have been overheard on the extension or partially overheard by patrons standing near the telephone. Thus petitioner was not reasonably entitled to assume that his conversation was being conducted in a situation of privacy.

Moreover, regardless of the reasonableness of his assumption, the controlling fact is that the objective conditions in which each conversation took place did not amount to a situation of privacy. At the very least, it may be said that petitioner has not discharged his burden of demonstrating to this Court a factual record unambiguously disclosing an unjustified invasion of his constitutional rights. A different holding in this case would provide a doctrinal justification for the claim that all privacy invading investigative devices are governed by Fourth Amendment standards.

In Section B, Respondent shows at the outset that there is a serious question as to whether petitioner effectively raised in the New York Court of Appeals questions as to whether the wiretap order here involved was supported by a showing of probable cause and whether it complied with Fourth Amendment criteria.

Respondent also contends that even if the *Berger-Katz* criteria are applied retroactively to this case, and it is urged that they should not be, then those criteria should not be enforced in their full rigor, lest the effectiveness of the wiretapping investigative device be compromised. In this section, Respondent examines in detail the various criteria mandated in *Berger* and suggests which are inappropriate and the way in which they should be relaxed or modified if they are to be applied to the subject of wiretapping. Such an appropriate relaxation of the *Berger* criteria would seem warranted in view of this Court's holding in *Camara* v. *Municipal Court* that Fourth

Amendment warrant procedures need not be enforced to a nicety in an area of investigation where full compliance would be difficult. Indeed, the concept of the unreasonable search and seizure reflected in the Fourth Amendment suggests the propriety of a flexible approach. It is noted that this Court, in *Katz*, seems to have relaxed the notice and the automatic termination requirements enunciated in *Berger* and respondent urges that the Court continue to adhere to this common sense approach.

Respondent also urges in this section that the Court hold that petitioner, not being the owner of the premises in which the eavesdropped telephone line was located, does not have standing to raise issues concerning the compliance of the wiretap order in question with Fourth Amendment standards.

Respondent also demonstrates in this section that the wiretap papers achieve an adequate degree of particularity in describing the persons to be overheard and the conversations to be intercepted.

Respondent contends that even if the Court should hold wiretapping to be within the regulation of the Fourth Amendment, the crucial question before it would concern the constitutional acceptability of the wiretapping in this case and not the constitutionality of the eavesdrop statute under which it was obtained. The contrary approach of *Berger* need not be followed in this case since the statute in question, Section 813-a of the Code of Criminal Procedure, no longer exists, having been replaced by a new statute enacting *Berger*-type criteria. Thus it is Respondent's view that the validity of 813-a and the question of whether the order herein was obtained under a valid statute or under the inherent power of the Court (seemingly recognized in *Osborn* v. *United States*) or under the authorization contained in Article I, Section 12 of the New York Constitution are not issues of federal constitutional proportions.

In Section C, Respondent discusses the form of the wiretap order and the proceedings culminating in its issuance and demonstrates that the order and the manner of its execution were not violative of Fourth Amendment standards.

POINT III

In Point III, Respondent reasons that petitioner's claims founded upon Section 605 of the Federal Communications Act are a legal nullity because 605 has been repealed by the federal Safe Streets Act, with the result that 605 has abated and been rendered inoperative. Respondent's position in this regard is in accordance with the doctrine propounded by this Court in *Hamm* v. *Rock Hill* (379 U.S. 306).

The *Hamm* rule is consistent with the long established practice of the common law. Its implementation would be particularly appropriate in this case because for 34 years it was the policy of the federal government and all of its agencies, judicial, legislative, and executive, not to treat state and federal wiretapping as violative of federal public policy. Thus it would offend the canons of reason if a federal court suddenly were to reverse that policy now by enforcing 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

POINT IV

Here petitioner argues that even if it be assumed, *arguendo,* that the Fourth Amendment governs the use of wiretap evidence of the type here in issue and that 605 did not abate, this Court should not give retroactive application to its decisions in the *Berger, Katz* and *Lee* cases so as to invalidate the judgment of conviction in this case.

State law enforcement officers have relied on the previous state of the law and the acquiescence of this Court

and all federal agencies in their use of wiretap evidence in State criminal trials. A retroactive application of the new doctrines of *Berger, Katz* and *Lee* would not remedy a defect in the fact-finding process or achieve the value of deterrence and would have an unfavorable impact on the administration of justice. Respondent disagrees with petitioner's alternative suggestion that the limited retroactivity principle of *Linkletter* v. *Walker* should be applied to this case. Even a limited retroactivity would impose serious hardships on the administration of justice.

Petitioner urges that the Court refuse retroactive application to *Berger, Katz* and *Lee* and instead apply the prospectivity rule of *Stovall* v. *Denno* so as to hold that *Berger, Katz* and *Lee* shall regulate only acts of official evidence gathering occurring after the dates on which these decisions were announced by this Court. Since both the wiretap interceptions and the trial of this case occurred before the *Berger, Katz* and *Lee* decisions were handed down, it is respectfully prayed that these decisions not be held determinative of the issues herein.

There is no reason why retroactivity should be enforced in this case since Congress has enacted a law strictly regulating official wiretapping and since all wiretap orders which were issued in New York State between the time the *Berger* decision was announced and the new New York *Berger* type statute was enacted were required to comply with the *Berger* criteria by the holding of the New York Court of Appeals in this case rehabilitating the previous New York State wiretap statute. Such a rehabilitative exercise is acceptable and raises no federal questions.

The previous New York wiretap statute required authorization by a court order complying with some of the *Berger* criteria and founded upon a showing achieving a level of demonstration substantially the same as a showing

of probable cause. Thus neither the objective of deterrence nor any other objective would be served by retroactive enforcement in this case.

POINT V

Respondent urges in this Point that the use of the wiretap evidence herein was not violative of the Ninth Amendment and that the Ninth Amendment does not establish a right of privacy as against telephonic eavesdropping.

It would be ironic if this Court were to accept petitioner's claim of an absolute retained right of telephonic privacy under the Ninth Amendment. It has consistently held for almost three decades that the national commerce power is plenary within its limits and that the reserved power referred to in the Tenth Amendment does not exercise an independent limitation on the commerce power. But if it accepts petitioner's claim of absolute right, the implication of such an acceptance would be that all national legislation based upon the commerce power which permits official wiretapping is unconstitutional.

If this Court should accept petititioner's contention that the Ninth Amendment contains a flat prohibition against all official wiretapping, whether pursuant to the authorization of a warrant or not, then there would be called into constitutional question all of the other privacy invading investigative devices employed by law enforcement officers.

This Court has not given sanction to such doctrines of complete prohibition in the past and its holding in *Griswold* v. *Connecticut* indicates that Ninth Amendment rights and rights enforceable through the due proces clause of the Fourteenth Amendment are subject to reasonable regulation under the police power.

If petitioner's Ninth Amendment claim should be sustained, this Court's attention will be burdened by every conceivable type of privacy claim against local and federal government. The Court will be under unrelenting pressure to undertake a new career of extreme judicial activism in the service of a novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy. Thus the Court will be called upon to invade a sphere of local life beyond the bounds of its historical concern.

The Ninth Amendment seems to refer only to rights in existence at the time it was adopted. Since petitioner appears to concede that the interest in telephonic privacy was unknown at that time, he cannot reasonably argue that the Ninth Amendment is protective of that interest. The interest protected in *Griswold* v. *Connecticut* was an immemorial right.

Moreover, as *Griswold* indicates, the Ninth Amendment simply refers to rights; it does not establish rights. Therefore if it be assumed *arguendo* that petitioner is correct in suggesting that such rights are evolving rather than static, it would follow that the states and their citizens shall determine the content of new rights and are empowered to regulate them in the public interest. The sovereign People, in contriving the structure of state government, and in constituting it the repository of their sovereignty, have delegated to it the authority to regulate those rights which are recognized in the Ninth Amendment. With respect to the State of New York, the process of delegation is specific and visible. In Article I, Section 12 of the New York Constitution of 1938, and in succeeding revisions thereof, the People have extended to law enforcement officials the power to obtain and use wiretap evidence.

Certainly, the Framers of the Ninth Amendment did not conceive that it should be invoked by a national judicial organ to supervise the relationships between the states

and their citizens and to forbid the states to exercise such powers as the People saw fit to grant them in State Constitutional Conventions. The theory of the Ninth Amendment urged by the petitioner is radical. If accepted, it will be the means of working a fundamental change in the federalist structure of authority ordained by the Framers and of changing our form of government from federalist to quasi-unitary. Thus this Court would be drawing to itself the authority to nullify the power and right of the People to choose the pattern of rights and duties which it felt best calculated to secure the general welfare.

Since the interest in telephonic privacy has not achieved uniform recognition throughout the country, it follows that petitioner is asking this Court to create a new right by judicial fiat despite the limitations on the federal judicial power contained in the judicial article of the Constitution. Dean Roscoe Pound, perhaps the most distinguished student of our public law, has stated that the retained rights referred to in the Ninth Amendment are to be defined and enforced by the states through their legislative institutions or by the People of the United States expressing themselves through the process of constitutional amendment.

POINT VI

In Point VI, Respondent urges that the due process clause of the Fourteenth Amendment affords no basis for a reversal of the judgment of conviction.

In Section A, Respondent contends that the due process clause of the Fourteenth Amendment does not protect a pure due process right of privacy independent of the specific guarantees of the Bill of Rights. Official wiretapping is a policy matter. It is not of such a nature as to require that this Court supervise local police eavesdrop activity. To the extent that our people wish to deal with

this problem in a national frame of reference, they may employ the machinery of the national legislative establishment.

The decisions of this Court reveal that it has not found a right of privacy in the due process clause of the Fourteenth Amendment. Even the common law of torts has been slow to recognize under the right of privacy concept the special sort of interest for which petitioner seeks constitutional protection. The various forms of tort action grouped under the vague rubric of right of privacy have no common conceptual core.

Griswold v. *United States* does not really enforce a right of privacy through the Fourteenth Amendment. It merely reaffirms the traditional principle that the police power may not express itself in the regulation of social situations beyond the ambit of its authority or by a regulatory means ill-adapted to its objective or more drastic than necessary. The *Griswold* Court simply said that it would not permit the limitation of the freedom of marital decision and action with respect to the use of contraceptives since such matters of personal discretion are beyond the power of government to treat. *Griswold* is really not a privacy decision. It affirms a "freedom to" do something, not a "freedom from" something. There is nothing in *Griswold* which would bar the search of the marital bedroom provided that such a search was authorized by a warrant obtained through a showing that there was probable cause to believe that such a search would yield evidence of a crime within the legislative power of the state to punish.

The government in this case (Kaiser) did not *regulate* telephonic privacy as the government in *Griswold* sought to regulate the marital relationship. The New York wiretap law is not a regulatory act and thus it does not "deprive" of "liberty" within the meaning of the due process clause. Moreover, telephonic privacy is not "liberty" within the meaning of that clause since liberty implies free-

dom of action, freedom to do something and suggests that government can not limit freedom of action except in a good social cause. The word "liberty" does not contemplate subtle intrusions on privacy which do not limit individual freedom of action.

It is true that the Fourth Amendment has been held to be incorporated in the due process clause but the Fourth Amendment is not really a privacy law. It is unjustified to read into the Fourth Amendment the alleged underlying value of privacy since such a reading would imply that the Amendment's purpose is to protect all of the myriad and distinct interests (having no common conceptual nucleus) which have been classified under the vague term "right of privacy" at one time or another in our history. This Court's due process jurisprudence, as reflected in the *Wolf, Irvine* and *Rochin* cases, indicates that there is no pure due process right of privacy. The penumbra technique is not applicable here since the interests protected by the First, Third and Fifth Amendments are not the same as that asserted by petitioner.

If this Court should recognize a due process right of privacy, state and local government will be inundated with litigation seeking to limit its prerogatives. Thus there may be occasioned an unobtrusive process of attrition which subtracts from the competence of government and undermines the regulatory process by which the discord and complexity of a highly interdependent society is brought within the coordinated control of society's chosen agencies of adaptation.

Even if the right of telephonic privacy as against official wiretapping were widely recognized in the common law or by popular custom (and it is not), that would not entitle it to protection under the Fourteenth Amendment since the due process clause protects only that relatively small category of rights which are truly fundamental in character. Moreover, petitioner's claim of absolute right is inconsistent with the long established principle that all

rights must yield to transcendent considerations of public welfare. The police power principle of necessity, sometimes referred to as the emergency power, has long been recognized in the literature of due process and provides ample justification for the official wiretapping which occurred in this case. Indeed, even in the absence of emergency, the rights protected by the due process clause are subject to regulation under the police power.

The claim of privacy urged upon the Court is new in conception and has yet to win its way to general social or legal acceptance. Like other newly emergent interests, it should seek its recognition in the domains of legislation and public opinion. Its claim of right has not attained sufficient maturity to engage the attention of this Court.

In Section B, Respondent argues that an absolute right of privacy as against law enforcement is indefensible on either philosophical or practical grounds. It is the creature of a legal imagination which sees the claims of freedom in an excessively restricted frame of reference and which fails to appreciate that judicious governmental intervention in the realms of freedom and privacy enhances the total quantum of freedom and privacy. The absolutist outlook fails to recognize the organic nature of society. Its philosophical essence is a naive individualism which views society in atomistic terms. It ignores the sovereign insight that rights are the product of organized society and, except to the extent mandated by unmistakable constitutional language, subject to those adjustments in content and extent necessary to the health and well being of that society.

Law enforcement should be accorded a preferred position in the pantheon of constitutional values since it is one of the great corrective processes of the free society. Through its enforcement of a democratic scheme of authority, it secures that state of social equilibrium in which public discourse may achieve its highest creativity. It disciplines and holds in check those malignant centers of

organized evil which threaten the primacy of the democratic state and activate the extra-legal strategies by which social power is removed from the possession of the people, thus denying them the means of exerting democratic control over the ends and processes of social life.

In Section C, Respondent contends that even if the due process clause protected a right of telephonic privacy, that right would be subject to regulation or invasion short of regulation under the police power of the state. It is demonstrated that both official wiretapping in general and the wiretapping here involved served the interests of society and thus are acceptable under those standards of constitutional legitimacy which govern the exercise of the police power.

In Section D, it is asserted that even if petitioner could justify the claim of a violation of due process rights, he is not entitled to reversal of the judgment of conviction because the due process jurisprudence of this Court does not require the exclusion at a criminal trial of evidence obtained in violation of due process standards at the pretrial stage.

While the Court has recognized an exception to this pure due process principle in the case of confessions, the principle, discernible in the *Wolf, Rochin* and *Irvine* decisional axis, is applicable to the present circumstances, since they do not involve the obtaining of evidence by means of physical brutality within the condemnation of the *Rochin* rule. The *Mapp* decision did not effect a transformation in this pure due process principle because the exclusionary rule there mandated was viewed in the Court's opinion as an ingredient of the Fourth Amendment and not a command of pure due process.

Nor may the petitioner rely upon this Court's "fair trial" jurisprudence. The fair trial principle has been employed to deal with defects in trial procedure and the quality of proof. Wiretap evidence, being probative, raises no such questions.

That official wiretapping is not shocking to the sense of justice within the meaning of the *Rochin* rule may be gathered from the fact that 27 states permit authorized telephonic interception and the President's Commission on Law Enforcement and Administration of Justice has recommended a regime of judicially approved official wiretapping.

POINT VII

Here Respondent argues that the self-incrimination provision of the Fifth Amendment does not protect a right of telephonic privacy. The Fifth Amendment is not really a privacy provision in this sense, and, moreover, secret telephonic interception does not "compel" the testimony of the overheard party within the meaning of the privilege.

POINT VIII

In this Point Respondent contends that the wiretapping in question did not violate petitioner's First Amendment rights and official wiretapping in general does not restrict the liberties protected under those First Amendment guarantees enforceable through the due process clause of the Fourteenth Amendment. New York State has maintained a regime of official wiretapping since 1938 without noticeably repressing the free interchange of ideas. Indeed, even criminals, who have the most to fear from such wiretapping, continue to speak freely over the telephone, as did petitioner in this case. Petitioner offers absolutely no proof to support his theory in this regard.

If wiretapping is objectionable on the ground alleged, then all forms of official surveillance and investigation of conspiratorial gatherings are unacceptable for the same reason. Furthermore, the conversations here in issue constituted manifestations of a criminal conspiracy and criminal conversations may be prohibited under the criminal law and suppressed altogether.

It is well established that speech which is brigaded with illegal action or involves a dimension other than mere expression may be regulated in the public interest. The telephone conversations in question were not even "regulated" and there was no attempt to impede their free unfolding. At most, official wiretapping could only constitute an indirect restraint on First Amendment freedoms, and such indirect restraints have been held acceptable by this Court where they were occasioned by the valid invocation of the regulatory power. Even where it has been confronted with direct restraints on First Amendment freedoms, this Court has employed the ad hoc balancing test to sustain such restraints where they arose out of the exercise of the police power in the service of some important public interest. Certainly the enforcement of the criminal law and the protection of citizens who have been threatened with bodily harm are paramount functions of government.

Petitioner can not claim a right of privacy founded upon the First Amendment since the limited right of privacy there protected is a derivative right deducible from the freedom of association held to be protected by that Amendment. This case does not involve an expressionary associative context or the assertion of a right of privacy designed to implement the lawful right of association.

The telephone is not the natural setting for the exercise of First Amendment freedoms. It did not exist when the First and the Fourteenth Amendments were adopted. The Framers envisioned the mails, the printing press and face to face discussion as the agencies of expressionary freedom. There is little which can not be said freely in today's permissive climate of opinion and, in any case, the discussion of intimate or embarrassing matters does not contribute to political and intellectual creativity.

In view of this Court's refusal to classify advertising and certain forms of commercial expression within the category of protected speech, it is doubtful that communications concerning intimate or embarrassing subjects are favored with the safeguards of the First Amendment. Such communications can be carried on through the mails or by face to face confrontations. On any reasonable application of the balancing test, the interest in sexy or flirtatious talk or idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement. It is not vital to the well being of the public that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution. Certainly a regime which permitted official wiretapping and barred private wiretapping would not inspire timidity as to legitimate business matters, so economic life would not be restrained.

Not every interpersonal setting qualifies for the full protection of the First Amendment.

POINT IX

Petitioner's contention that the trial prosecutor erred in referring to his inculpatory recorded telephone conversations as confessions is a mere terminological quibble and does not present a federal question of substance to this Court. Even if it be claimed that the trial prosecutor may have departed from an exacting standard of semantic precision, it can hardly be said that substantial rights of petitioner were prejudiced thereby. This Court does not sit to vindicate exquisite niceties.

This Court has held that a court procedure does not offend against the due process clause simply because another method may seem to the Court fairer or wiser or to give a surer promise of protection to the prisoner at

bar. The conversations in question were dramatically inculpatory. Does petitioner seriously argue that the case would be fundamentally different in its constitutional significance if the trial prosecutor, instead of using the convenient word "confession", employed some such unwieldy phrase as "statement of facts which, if given to a police officer, would have constituted a confession of guilt" or some other burdensome structure of rhetoric?

It can scarcely be argued that the difference between these two phraseological modes is so substantial as to require the corrective intervention of the highest court in the land. To argue thus is to found constitutional rights upon discriminations too subtle for the governance of a system of constitutional redress which takes the brute textures of social fact as the underpinning of decision and the realm of gross events as the theatre of its operation. Fundamental law is the ordering instrument of a mundane society, not the vindicator of luxurious refinements.

POINT X

In Point X, Respondent asserts that petitioner's anti-wiretap philosophy, as expressed throughout his Brief, and particularly in pages 46 through 48, is based on a crudity of analysis and a failure of policy insight. The President's Commission on Law Enforcement and Administration of Justice has found that the telephone is an indispensable weapon in the arsenal of organized crime. In declaring that telephonic communication is beyond the power of the state to investigate by the only effective method of investigation, wiretapping, petitioner, is, in effect, proposing that the telephonic medium be immunized from all social control and that society permit criminal forces to preempt a whole technology for their unimpeded use.

Petitioner's thesis is nothing less than this: that there is an instrument of social life so unique in its character

and so superior in its status as to be exempt from those normal processes of social regulation and inquiry to which all other acts and agencies of social life are subject. Petitioner fails to realize that the telephone is a public instrumentality and liable to that high degree of regulation characteristic of all instrumentalities and utilities in the public domain.

Petitioner raises the dread spectre of official abuse. However, all official power is capable of abuse and to deduce the illegitimacy of power from the possibility of its abuse is to condemn all government to impotence. In view of the practical and mechanical limitations on electronic surveillance, petitioner's fear of pervasive and intensive official electronic surveillance is groundless.

At a time when extra-legal power jeopardizes the very foundations of lawful authority, a judicious balance of interests suggests the necessity of fashioning those instruments and institutional mechanisms through which the organized state can maintain the integrity of the community it serves. Wiretapping and electronic surveillance are indispensable instruments in the war on those malignant forces of privilege which challenge the primacy of democratic government itself. The general welfare is not advanced by an ideology which would deny the free society the indispensable means of its preservation.

ARGUMENT

POINT I

It is respectfully urged that this Court should hold that wiretapping is not regulated by the Fourth Amendment.

A. There is no merit in Petitioner's contention that section 605 of the Federal Communications Act brought telephone conversations within a realm of privacy protected by the Fourth and Fifth Amendments to the United States Constitution.

Petitioner argues, on page 59 of his Brief, that:

> "... The interaction between Section 605 and the Fourth and Fifth Amendments extended the reach of those amendments and required the exclusion of the wiretap evidence; more specifically, Section 605 was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments, and the absolute prohibition contained in Section 605 ... made unreasonable, within the meaning of those Amendments, any search for telephone conversations ...
>
> "We urge that Section 605 extended the individual's right of privacy to his telephone conversations; it broadened the enclave of privacy to which the individual may lay claim under the Fourth, Fifth and Fourteenth Amendments, regardless of whether those Amendments would otherwise directly provide such protection. Although Congress may not restrict the application of a fundamental Constitutional guaranty, it may, when acting within its legitimate area of authority—here interstate communications—confer additional rights upon the individual, which rights, by their nature are drawn within the protection of the Constitutional guaranty."

Petitioner's thesis in this regard has the dubious virtue of novelty, but it is founded upon a deficiency of insight and offends against the principle of separation of powers and

the constitutional provision regulating the procedure of constitutional amendment.

It is urged by Respondent that this Court should hold that the Fourth Amendment does not govern wiretapping. However, if the contrary thesis be accepted and the Fourth Amendment is read so as to include telephone conversations within the boundaries of its protection, then it follows that such conversations may be intercepted under permission of a warrant, since every other protected class within the scope of the Fourth Amendment is subject to such invasion under the warrant provision of that Amendment. It is a principle of fundamental status that neither 605 nor any other mere statutory enactment can abrogate the Fourth Amendment's permission to invade an otherwise protected area on the authority of a warrant. Such permission can not be withdrawn by 605, since a constitutional provision can not be amended by statute. The exclusive method of constitutional amendment is set forth in Article V of the Constitution and precludes amendment by any other means than that set out therein.

If this Court were to accept petitioner's argument in this regard, it would, in effect, be re-writing the Fourth Amendment so as to exempt one and only one protected class, the telephone conversation, from the warrant provisions, which, by the clear terms of the Fourth Amendment, are applicable to all protected classes within the shelter of its safeguards. There has not been confided to this Court the overriding prerogative to so recast the provisions of a written constitution, its authority being confined in the judicial article to application of the law as written. Such a process of judicial amendment would violate the principle of separation of power which is implicit in our constitutional scheme, as well as the amendment provision of the Constitution.

The Fourth Amendment does not protect a general right of privacy (*Katz* v. *United States*, 19 L. ed. 2d 581)

and does not ordain a vague, formless and generalized liberty exempt from all intrusion by the organized state. The Fourth Amendment only extends its safeguards to the protected classes specified in that Amendment and telephonic communication is not one of the specified categories. (It hardly could have been included since the telephone had not yet been invented when the Constitution was promulgated.) It follows that Congress can not add to the prohibitions of the Fourth Amendment simply by multiplying statutorily-created categories of protection against invasions of privacy of a sort not described in that Amendment. If Congress, for example, passed a law prohibiting interstate shadowing of suspects by State police officers, it could scarcely be claimed that such shadowing would thereby be forbidden by the Fourth Amendment.

B. It is respectfully urged that this Court limit the *Katz* rule to its special facts and hold that a non-trespassory wiretap interception of a telephone conversation is not a search and seizure within the control of the Fourth Amendment. A contrary decision, especially one ordaining a broad right of privacy, would render constitutionally suspect all other police investigative devices involving an invasion of privacy, since there may be no ground which seems plausible to State and Federal Courts on which such a principle could be limited so as not to apply to such devices as non-trespassory, non-electronic eavesdropping, informer intelligence, shadowing of suspects, visual observation with or without the use of binoculars, telescopes or other visual aids, non-trespassory stake-outs of premises in which criminal enterprises are being organized, etc.

Respondent respectfully prays that this Court reconsider the legalistic underpinning of its decision in *Katz* and confine the *Katz* rule to its special facts so as to render it inapplicable to the type of non-trespassory wiretapping at issue in this case. In order to achieve this result, it is not necessary for this Court to go so far as to revive the

Olmstead-Goldman-On Lee-doctrine that only trespassory eavesdropping is within the regulation of the Fourth Amendment. The Court need go no further than to hold that the *Katz* rule applies only to electronic eavesdropping which involves *some physical contact* (whether amounting to a trespass or not) with the structure within which is occurring the conversation which is eavesdropped.

Since the Court held in *Silverman* that a 6 inch penetration into a wall was sufficient to activate the Fourth Amendment and since, in *Clinton* v. *Virginia*, 377 U.S. 158, it was held in the concurring opinion of Mr. Justice Clark that the mere penetration of the sort made by a thumbtack rendered operative the safeguards of that Amendment, a restatement of the *Katz* rule dispensing with the need of *penetration* and declaring *mere contact* to be the determinant of constitutional protection would be a natural doctrinal progression. There would appear to be no obstacle in *Berger* to such an exercise, since, in Respondent's view, the Court of Appeals in this case was correct in interpreting *Berger* as not bringing wiretapping within the ambit of the Fourth Amendment. It will be recalled that the police officers in *Katz* had placed a recording device on the top of the telephone booth in which the overheard conversant was talking. Thus the recording device in *Katz* was in physical contact with the structure within which the monitored portion of the conversation was occurring.

It is true that a few phrases of the *Katz* decision may be read to stand for the proposition that the Fourth Amendment safeguards the person rather than protected physical areas, but these brief evocations should not be invoked for a purpose beyond their intention or permitted to foreclose an issue as momentous in its practical implications as that now before the Court. Neither practical reason nor constitutional theory requires that this Court should press to the limit of their practical applications in

all unforeseen future situations those legalistic expressions which it invokes in the restricted contexts of limited controversies. As Mr. Justice Frankfurter has remarked in *Rochin* v. *California* (347 U.S. 165, at 174):

> We are not unmindful that hypothetical situations can be conjured shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is intended to preserve practical and substantial rights, not to maintain theories. *Davis* v. *Mills,* 194 US 451, 457, 48 L ed 1067, 1071, 24 S Ct 692.

It is not clear from the language in *Katz* just how far the Court meant to go in rejecting the protected area concept and to what extent it meant to accept the personal right theory. Just as nothing in *Katz* requires the Court to go all the way in its espousal of the protection of the person theory, nothing in that decision stands as an insuperable legalistic obstacle to the limitation of the *Katz* rule at any point within the gamut of privacy invading investigative devices which the Court feels is appropriate. Unless an arid conceptualism is to be the determinant of constitutional decision, the adjudicatory process must respond to the imperatives of practical necessity. It must weigh the necessity for constitutionalizing the subject of official wiretapping against the disadvantages, doctrinal and practical, to be apprehended from the Court's intervention in an area already well controlled by statute.

Katz need not be read as implying that wiretapping is within the governance of the Fourth Amendment simply because the majority opinion of Mr. Justice Stewart rejects the trespass test which had been approved in *Olmstead. Olmstead* was not expressly overruled in *Katz* and the mere fact that the *Katz* court did not accept the *Olmstead* trespass rationale does not mean that it would not sanction some other legalistic principle justifying the same

result as that achieved by the *Olmstead* decision. This analysis derives confirmation from the realization that if this interpretation of *Katz* is not correct then, *Katz*, if it brings wiretapping within the scope of the Fourth Amendment, was authorizing wiretap interceptions pursuant to the approval of a court order of the type mandated in *Katz*, despite the fact that Section 605 (as interpreted in *Benanti* and re-interpreted after *Katz* in the *Lee* decision) prohibited all interceptions and divulgences of telephonic communications.

The practical considerations dictating such a limitation in the *Katz* rule are weighty indeed. If the *Katz* doctrine is not so confined, then it may be argued that the non-electronic overhearing of conversations between criminals talking confidentially in the street or at a secluded table in a public restaurant will be within the regulation of the Fourth Amendment and may proceed only under the permission of a warrant. More, the implication of an unlimited *Katz* rule would be that invasion of privacy by sight as well as by hearing is regulable by Fourth Amendment standards.

Formerly information learned by sight was only subject to the exclusionary rule of the Fourth Amendment where it was obtained by observations made during a trespass (see *U.S.* v. *Lee*, 274 U.S. 559, 563; *On Lee* v. *U.S.*, 343 U.S. 747, 754; *McDonald* v. *U.S.*, 355 U.S. 451). Since *Katz* seems to have eliminated the trespass requirement, an intrusion on privacy effected by looking through the window of a home while standing on a public sidewalk might be considered within the control of the Fourth Amendment.

In other words, if the conceptual underpinning of *Katz* is viewed as a right of personal privacy as against privacy-invading investigative devices, it may seem to lower courts that there is no logical reason why *Katz* could not be invoked

to condemn all of the many police practices that involve non-trespassory invasions of privacy, *e.g.*, non-electronic eavesdropping, electronic eavesdropping not involving physical contact, shadowing of suspects, visual observation with or without the use of binoculars, telescopes or other visual aids, non-trespassory stake-outs of premises in which criminal enterprises are being organized, informer intelligence not based on voluntary disclosures by the suspect, etc.

In many situations where the police conduct non-trespassory eavesdropping (either with or without electronic aids) on conversations between criminal conspirators or, *e.g.*, between one engaging in criminal distribution of narcotics and his distributee, the conversants believe that their conversation is unheard by others, as did the conversant in the phone booth in *Katz*. Similarly, in cases where the police use binoculars, telescopes or search lights to gain a visual observation of something they could not otherwise see, or peer unobtrusively into a window, with or without visual aids, under circumstances not involving a trespass on the curtilage or protected area of private property, the wrongdoer sighted is usually secure in a not unreasonable belief that his criminal activities are not being observed. In these cases, that which is seen or heard would not have occurred if it was known that someone was hearing or observing it.

Thus if the *Katz* rule is not limited as here suggested, and, instead, is extended to include wiretaps, it would also seem applicable in principle to these other forms of investigation since it can be argued that there is reasonable reliance upon a presumption of privacy by the persons investigated in these circumstances just as there was by the conversant who relied upon the privacy of the telephone booth in *Katz*.

Such might be the theoretical implications of a holding that the Fourth Amendment's regulatory reach is not restricted to seized tangible objects and is not predicated upon some physical contact with a protected area.

It is for this reason that it is respectfully urged that this Court quiet all doubts as to the legitimacy of traditional investigative devices by circumscribing the breadth of the *Katz* precedent.

Unless the Court adopts the approach here urged upon it, a precedent may be established in this case which requires police officers to make a showing of probable cause and to obtain a warrant before employing any investigative device which infringes personal privacy. Even if this Court should not hold to this effect in so many words, the doctrinal implications of its holding may be viewed by state and lower federal courts as compelling them to rule inadmissible all evidence obtained by privacy-invading investigative devices without the permission of a warrant valid under the standards of the Fourth Amendment.

And its holding may exercise a constraining effect on the activities of law enforcement officers mindful of the possibility that they may be subject to civil suit or criminal prosecution under the federal Civil Rights Laws for invasion of privacy. (See 42 USC 1983, 1985, *Monroe* v. *Pape,* 365 U.S. 167, and *York* v. *Story,* 324 F. 2d 450, 9th Cir., cert.. den. 376 U.S. 939, 964, concerning civil suits, and 18 U.S.C. 241, 242, *U.S.* v. *Price,* 383 U.S. 787, and *U.S.* v. *Guest,* 383 U.S. 745, concerning criminal prosecution.) The effects of such a holding on the already low morale of police throughout this country may lead to widespread cynicism in the police establishment concerning the obligation to respect this Court's decisions, an increasing official diffidence and a flagging of enforcement energies side by side with an expanding tendency toward tolerance of extra-legal law enforcement.

Indeed, if the Court's decision in this case should be susceptible of the interpretation that the Fourth Amendment protects personal privacy against privacy-invading inestigative techniques, it is far from unlikely that it may

encourage a massive outpouring of damage suits or injunction actions based upon the Fourth and Fourteenth Amendments against federal, state and local governments and officials for every conceivable invasion of personal interests which are vaguely classified under the concept of privacy. That suits founded directly on these Amendments themselves, or on federal Civil Rights Laws implementing them, may not have occurred in volume before is no guarantee that they will not occur in the future, in view of the expanding trend of anti-police militancy which is sweeping the nation. It is conceivable that such Amendments might be invoked by suitors to supplement limited tort categories and avoid governmental immunity laws.

Such a constitutional regime would deal a fatal blow to law enforcement. This Court may judicially notice (*Dennis* v. *United States*, 341 U.S. 494; *Brown* v. *Bd. of Ed.*, 347 U.S. 483) that most of the investigative devices specified above are often employed at a time when there is not sufficient evidence of crime to enable a showing of probable cause.

Indeed, devices such as shadowing and visual observation are employed in order that the police may gather sufficient evidence to enable them to procure a search warrant. Obviously, at the beginning of an investigation, evidence amounting to probable cause does not exist and if it is insisted that no investigation may begin until such a quantum of evidence has been obtained, it will not be possible to conduct any investigation at all.

It would be impossible under such a system to deal effectively with organized crime. Wiretapping, electronic surveillance (see The Challenge of Crime in a Free Society, a report by The President's Commission on Law Enforcement and Administration of Justice, pp. 201, 203) and such other investigative procedures as shadowing, non-electronic eavesdropping and informer intelligence (see Harvey and

Cross, The Informant in Law Enforcement—1960) are absolutely indispensible in law enforcement's efforts to bring to justice the higher-ups in organized crime enterprises. Even assuming, as the majority opinion in *Katz* indicates, that *Katz* does not reject the Hoffa-Lewis approach permitting participant monitoring or party recordation or the testimony of an informer as to admissions made to him, it may, if interpreted broadly, prohibit informer evidence obtained by stealth and without the cooperation of the suspect.

In his concurring opinion, Mr. Justice Harlan seeks to limit the *Katz* doctrine so as to retain the protected area concept while eliminating the physical intrusion requirement. It is not certain whether this concurring opinion fully renders the legalistic purport of *Katz*. If it does, it would appear that the *Katz* rationale excludes wiretapping from the purview of its doctrine.

Justice Harlan's opinion (19 L. ed. 2d at pages 587-588) declares in part:

> "I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, and unlike a field, Hester v. United States, 265 US 57, 68 L ed 898, 44 S Ct 445, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; * * * Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

> The critical fact in this case is that '[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume' that his conversation is not being intercepted. Ante, p. 582. The point is not that the booth is 'accessible to the public' at other times, ante, p. 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v. United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431."

Justice Harlan's opinion seems to say that the protection of the Fourth Amendment only attaches to a person subjected to official eavesdropping when he is in an enclosed place that is, at that moment, private, and that although the eavesdrop equipment need not penetrate that place *physically,* it must do so *electronically* before the Fourth Amendment is offended. Since the conversant can not place himself inside of a telephone line and since a wiretap eavesdrops on that line and not on the place where the talker is located, it would appear, under Justice Harlan's interpretation of the *Katz* holding, that wiretapping is not within the regulation of the Fourth Amendment. In a footnote, however (at 19 L.ed. 2d, on page 588), Justice Harlan opines that the course of development culminating in *Katz* must be recognized as overruling *Olmstead,* so the matter is afflicted with uncertainty. It may be that Justice Harlan is only suggesting that the trespass doctrine of *Olmstead* has been rejected rather than its holding that wiretapping is not within the regulation of the Fourth Amendment.

In any case, Justice Harlan's approach would appear to extend the scope of *Katz* farther than this respondent suggests. It is respectfully submitted that Justice Harlan's formulation, though reflecting superior insight and a high respect for the values of federalism, might still entail practical disadvantages. The doctrine he approves could be used to protect from warrantless eavesdropping,

persons conversing briefly in secluded corners in public places or restaurants in low tones audible to electronic surveillance equipment or to an eavesdropper hidden behind a post or curtain, since an expectation of privacy in such circumstances might be viewed as reasonable. Conversations of this kind are frequently encountered in law enforcement. They are over so quickly that there is not time to get an eavesdrop order and often there is not sufficient evidence to make a showing of probable cause. They may be eavesdropped with the aid of the parabolic "mike" and other modern equipment.

It is urged that the physical contact theory expounded in this section by respondent would exercise less restraining effect on law enforcement. Control by this Court over electronic surveillance is not necessary. It has already been subjected to regulation by federal and state governments. Moreover, the police are not interested in abusing their investigative powers by employing electronic surveillance in situations where it serves no law enforcement needs. Budgetary and time limitations mitigate against this, as is shown in the discussion in the last Point in this Brief. The pressures of police work do not admit of idle snooping.

The crucial policy need is that private electronic eavesdropping be stopped and that is an objective beyond the power of this Court to achieve. It is believed that the recent federal and state legislation on the subject has dealt with it effectively and that this Court should not, out of an understandable concern about official eavesdropping, propound a restrictive doctrine which further narrows the prerogatives of those who protect society from evil.

If this Court places its imprimatur of approval upon a broad Fourth Amendment principle of privacy, there may, as a consequence, be visited upon the American system of criminal justice tasks and burdens beyond its capacity to assume. For example, if the doctrine should gain currency that every privacy-invading investigative technique must

be legitimized by the warrant procedure of the Fourth Amendment, it would follow that extensive pre-trial motions and hearings to test the legality of such devices will be required in every state and federal criminal case.

The added burdens thus imposed on state and federal judicial apparatus might result in a break-down of law enforcement. Collapse could confidently be predicted in urban areas such as New York City and its environs, where dramatic increase in criminal motion calendars has overburdened limited judicial personnel and has contributed to calendar congestion and serious delays in the trial of major felony cases. There are instances in which felons awaiting trial have been lodged in jail for as long as one year prior to trial because they were financially unable to make bail. The imposition of further burdens upon urban systems of criminal justice will only compound this unfortunate state of affairs.

Moreover, the proliferating nuances of an expanded right of privacy would provide innumerable additional grounds for federal habeas corpus relief and would result in the enormous burdens on the federal court system arising from burgeoning attempts to vacate state criminal convictions in federal tribunals. While the rational response to such problems might be an expansion in the judicial establishment and in the personnel of the courts and prosecutory agencies, political and financial realities suggest that timely reform is unlikely. Such considerations have been recognized as relevant in the process of constitutional adjudication (See: *People* v. *Letterio*, 16 N.Y. 2d 307).

In the light of the above analysis, it may be seen that the practical consequences flowing from the establishment of an investigative right of privacy are more than the social traffic will bear and involve great dangers to the orderly functioning of American society and those judicial and law enforcement processes which form its indispensable basis. If this Court should apply the *Katz* doctrine so as

to hold, in effect, or to imply that the Fourth Amendment does not merely safeguard protected areas, but, more, preserves the privacy of the accused as against privacy invading investigative techniques, the Fourth Amendment's protective dimension would be enlarged far beyond traditional boundaries and the rule of *standing,* which is still recognized in this Court's Fourth Amendment jurisprudence, albeit, in somewhat relaxed form, might fall by implication. Such a result would follow if the doctrinal underpinning of the Court's decision was an avowedly broad conception of Fourth Amendment privacy.

Thus if the Court defined privacy in the Fourth Amendment context in unlimited or comprehensive terms, lower courts, state and federal, might, by a bold course of inference, deduce the conceptual consequences of the Court's full-blown statement as protecting from official invasion not only the physical person of the accused, any area in which he is located and any projection of his voice but also any other expression or emanation of his personality or person which was intended to be private, such as inculpatory writings or pictures of himself or any possession which he had placed in such circumstances as reasonably to indicate an intention to preserve it in a condition of privacy.

That such might be the results of a magisterial pronouncement of doctrine which aggrandizes to the limit the regulatory grasp of the Fourth Amendment is suggested by the fact that the common law of various states has protected a wide spectrum of interests under the rubric of privacy. These interests include the right to insist that one's artistic and literary creations (See: Prosser, Privacy 48 Cal. Law Review p. 383, 401-7), recorded emanations of one's person such as photographs (*Pavesich* v. *New England Ins. Co.,* 122 Ga. 190, 50 SE 68) films (*Melvin* v. *Reid,* 112 Cal. App. 284, 297 P. 91) and one's property (See: Prosser, Privacy, 48 Cal. Law Review 383, 392-8)

remain inviolate against the intrusion of public attention.

If the Court's theoretical framework conceives of the Fourth Amendment as guaranteeing all individual privacy against official investigative efforts, facile analogies to tort rules of privacy might impel some state and federal courts to declare e.g. that written evidence of the fruits of crime buried by the accused in a forest or secreted on someone else's property could not be obtained by police without a warrant and that the accused had standing to raise Fourth Amendment questions concerning search and seizure under such conditions.

Situations such as these are frequent in law enforcement, and if it should be held that they are within the control of the Fourth Amendment, the consequent requirement of obtaining a warrant will impose heavy additional burdens on courts and law enforcement agencies. If the scope of the Warrant clause is extended so radically as to require a warrant for every type of privacy invading investigative device and in every situation where evidence has been secreted or kept from general attention by the accused, the law enforcement function will be rendered impotent.

If the personal privacy interpretation of the Fourth Amendment gains currency, and if the diverse interests subsumed at one time or another under the right of privacy in private law should be assimilated into the lower court jurisprudence of the Fourth Amendment, it might well result in the abrogation of the traditional principle that the Fourth Amendment regulates only official conduct. For example, if the concept recognized in some jurisdictions (e.g., *Baker* v. *Libbie*, 210 Mass. 599, 97 NE 109) that there is a right to prevent publication of private papers should be absorbed into a broad right of privacy protected by the Fourth Amendment, it would follow that official use of such evidence might be prohibited where the evidence was obtained by a private person necessarily without the authori-

zation of a warrant and without official complicity and accepted by the police. Such a result would be in accord with the principle sometimes recognized in private law barring the use of such material by a blameless transferee. (See *United States* v. *Fleming,* 69F Supp. 252.)

Nor may it be assumed with confidence that Courts will not decree such a regime of unreason. The catalytic effects of this Court's decisions produce results beyond its intentions. Case by case adjudication rarely moves to the guidance of a presiding forevision. As it transacts its narrow and transitory concerns, it proceeds by short and unknowing steps toward a goal unseen. Its theatre is the restricted context, its object impromptu adjustment, its selective focus the special instance rather than the panoramic insight. It goes forward in ignorance of its ultimate destination or the total effect of its separate acts of judgment. It is only when its career has run its course that the mystery of its larger significance is dispelled.

It is respectfully submitted that the Court will not necessarily obviate these dangers by a limited exercise in legalistic innovation which carefully circumscribes the extent of its reach. Even if this Court should opt for a small advance in doctrine, even if it should stop short of extremism, its step along the path will not be the last. The goal which it regards as marking the limits of the possible may simply provide the point of departure for a successor Court, so that, by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement.

Constitutional history records that expansions in freedom are but preparations for further expansions, that, except in times of war or external peril, our constitutional system is not impartially responsive to the values of liberty and order and is only adjustable in the direction of broader individual rights in the field of criminal procedure.

In the end, this steady attrition of official competence may produce a fundamental alteration in the balance of social forces, such that extra-legal power will no longer wear the aspect of the transient and eccentric, but rather will stand forth as a virulent and ineradicable feature of a permanently flawed society.

Katz may, without unwelcome practical result, be so limited as to exclude from the coverage of the Fourth Amendment wiretapping which does not involve physical contact with the structure in which the eavesdropped conversation is occurring. Most wiretapping does not involve such contact, nor was there such contact in this case (A.117-120, 141; pages 18-21, Brief for Petitioner). Since official wiretapping, state and federal, is now strictly controlled by the Safe Streets Act, and, in addition, by State laws (see enumeration of state statutory provisions in 68 Columbia L. Rev. #2, page 207), protection of privacy will not be sacrificed by such a holding.

C. The attempt to justify the extension of the Fourth Amendment's coverage to include telephonic privacy by recourse to the alleged inherent purpose or underlying values of that Amendment is a questionable exercise.

Petitioner seeks a more ambitious statement of doctrine from this Court than that recommended by Respondent.

There is a method of judicial decision which is activist in character and which views the process of constitutional adjudication as that crucial exercise which effects a continual renewal of our constitutional tradition by the tactic of judicial amendment. It is this tactic which petitioner seeks to call into operation. Some commentators have sought to sustain the judicial expansion of constitutional guarantees with a justifying ideology which takes as its central principle some such standard as the "essential nature" or "implicit purpose" of the guarantee under consideration. Such standards, are, however, the product

of a rather questionable intellectual method. It consists of taking the restricted values recognized in constitutional language and expanding them far beyond the boundaries contrived by the draftsmen of the Constitution.

Thus, for example, some observers, ignoring the special evils which the Framers had in view in composing the Fourth Amendment, have sought to generalize from the limited right of personal and domiciliary repose to which the language of the Fourth Amendment was limited so as to argue that the Amendment's "purpose" was to protect privacy.

However, neither textual phraseology nor constitutional history discloses any such purpose. *Indeed, such a vague animus, even if it was reflected in the deliberations of the Framers, would hardly constitute a coherent "purpose" at all, since its surpassing indefiniteness and the inherent ambiguity of the concept of privacy make it an unsuitable guide to a judicial process obligated to define the precise contours of enforceable rights.*

The vague concept of "privacy" has been applied to a wide variety of dissimilar situations and values and to argue that the Fourth Amendment's "purpose" was the protection of privacy is to tell us nothing about what types of specific rights are within the limits of its teleology.

Some authorities have viewed the so-called right of privacy as a philosophical or sociological generality without sufficient precision to be enforced as a legal right. (See: Davis, What Do We Mean by the Right to Privacy? 4 SDL Rev. 1.)

To contend that the Fourth Amendment celebrates so vague and inchoate a conception is to read into that Amendment an idea which is not expressed in its language and to falsify the intent of the Framers, who drafted the Fourth Amendment to deal with specific evils (*e.g.*, the use of the vague general warrant or writ of assistance by

excise inspectors to effect clamorous entrance into the homes of law-abiding citizens and to seize their property). The obligation of this Court to respect the intent of the Framers has been most eloquently argued by one of its own members, Mr. Justice Sutherland (in *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 448).

It is clear that the Fourth Amendment was a restricted exercise in problem solving, not a lofty expression of social philosophy, and to infuse it with a broader purpose is no more justified than would be a reading of the First Amendment, *e.g.,* which holds invalid a local ordinance providing for municipal festivals on the theory that the noise entailed in such proceedings will, to some extent, inhibit that free flow of ideas which is the "purpose" of the First Amendment.

The vagueness of the right of privacy concept is partially attributable to the fact that it has been used as a conceptual catchall to describe so many different types of social interests. Also, the concept is infected with a zone of uncertainty owing to the fact that it has not been brought to that state of articulation where it gives clear indication as to what configurations of social fact are situations of privacy within its meaning and what type and degree of invasion of a situation of privacy amounts to a legally actionable encroachment upon the interests protected by the concept. Indeed, no exhaustive identification has been made of the full range of special interests protected within the right of privacy concept, and although special rights of privacy have been elaborated by the ad hoc process of judicial decision, primarily in the field of torts, it is impossible to draw from the doctrinal apparatus of the cases the organizing insight which declares the conceptual essence of the general right of privacy. (This matter is discussed in some detail in the portion of this brief dealing with the right of privacy claim founded on the Fourteenth Amendment.)

The adjudicatory process has, at various times, given legal recognition to privacy of personality which protects from disclosure or exploitation the name, appearance or other aspects of the person, and the facts and circumstances of his personal life. It has also conferred the benefit of its protection on various types of confidential information, such as census data, financial intelligence, income tax information, etc.

It has further recognized the legal claims of special confidential relationships and the special privileges of confidentiality deducible from such relationships.

It has recognized the legal right to security against heinous intrusions of the physical person, unwarranted invasions with respect to papers and other possessions, property and artistic products. And this enumeration is far from exhaustive. (For an inventory of the States which have recognized the tort action for invasion of the interest in privacy, see Prosser, Torts, Sec. 112, 3rd Ed. 1964.) As may be seen, these forms of action involve distinct types of interests.

Thus when it is argued that it is the "purpose" of the Fourth Amendment to protect privacy, we do not really know that is meant by that assertion in concrete terms.

It is true that the tort concept of negligence is also vague, but at least its application in adjudicative contexts is restricted by recourse to the guidance of the reasonable man standard, and, in any event, is administered by State common law courts charged by a long tradition with the duty of policy making. For a constitutional court to fashion such a role for itself is totally inconsistent with its obligation to expound a written Charter. Moreover, it is one thing for a tribunal to administer a concept given the explicit sanction of law. It is another for the guardians of our fundamental law to import into its written embodiment a "purpose" so vague as to justify a virtual

rewriting of it. That would appear to be what petitioner asks this Court to do.

Such a technique as that impliedly contended for by petitioner can be used to expand every constitutional guarantee far beyond the limits suggested by its language and history. Moreover, a regime of constitutional adjudication which rejects the relatively definite and objective standards inherent in constitutional language and history must necessarily be a continuing exercise in subjectivity since the vague "purposes" accepted as the determinants of decision-making leave discretion at large and vulnerable to the personal preferences of the judicial tribunal pronouncing judgment, however high minded it may be.

Nor can such an exercise in judicial creativity be justified by a resort to speculations as to how the Framers would react to modern conditions. We can never know how they would react. They might be so impressed with the growing threat of crime as to reject all proposals for expanding constitutional guarantees in such a way as to burden the process of law enforcement. They were, after all, essentially conservative people, mindful of the values of law observance and public tranquility. So far as history tells us anything at all about the motivations of our constitutional fathers, it tells us that the Framers and Adopters of the Fourth Amendment were concerned to protect domiciliary repose and the sanctity of person and property as against arbitrary seizure and not the subtle condition of privacy.

Patrick Henry insisted on the necessity of adopting a Bill of Rights in order to prevent such invasions. He declared "excisemen may come in multitudes; for the limitation of their numbers no man knows. . . . They may . . . search, ransack, and measure, everything you eat, drink and wear . . . any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason" (3 Eliot Debates, 448-49, 588).

Professor Kenneth Davis has remarked that such invasions under "the odious writs of assistance . . . helped ignite the fire of the American Revolution" (Davis, Administrative Law Treatise, 231-232).

When the Fourth Amendment is analyzed in terms of the conditions of its genesis, the inference is inescapable that suitors such as petitioner, who justify a broad reading of the Fourth Amendment on grounds of "purpose" and who contend for an absolute view of constitutional rights, are more interested in enforcing their own constitutional ideologies than in respecting the provisions of our fundamental law.

The Fourth Amendment is obviously the product of certain traumatic social experiences which galvanized public attention and focused it narrowly on the questions of specific abuse and specific remedy. The Fourth Amendment is a provision which had its inception amid the stress of special circumstances. Its plain language bespeaks the limited character of its objectives. To convert it from an *ad hoc* vehicle to an abstract principle is to ignore that exegetic ordinance which makes textual meaning the determinant of constitutional adjudication. (With regard to the obligatory character of constitutional rhetoric, see Merrill, Constitutional Interpretation: The Obligation to Respect the Text, in Perspectives of Law: Essays for Austin Wakeman Scott, page 261–1964.)

The Fourth Amendment is not a privacy law. In its objective meaning, it is aimed at preventing overzealous officials from unreasonably seizing property or persons and doing it by clamorous and obstreperous invasion of house or person. In this sense it aims at making the citizen master in his own home. It was not designed to secure privacy of the type demanded by advocates of telephone privacy. The type of personal and domiciliary repose sought to be guaranteed by the Fourth Amendment, if it be called "privacy", is not the same type of interest sought

to be vindicated under the claim that telephonic communication should be conducted without being overheard. It is significant that the practice of non-electronic official eavesdropping was known to the Founding Fathers, as Justice Black has suggested, but they did not seek to bar it in the Fourth Amendment or elsewhere because it was not this subtle type of privacy—invading activity that they were concerned to prevent. Thus to say that the Fourth Amendment's essential or implicit purpose was "privacy", does not justify the extension of its regulatory ambit to wiretapping on the theory that its purpose is to protect all of the myriad and distinct interests classified under the vague term "privacy" at one time or another in our history.

D. It is respectfully submitted that official wiretapping should not be constitutionalized.

It is respectfully submitted that this Court should not declare wiretapping to be regulated by the Fourth Amendment, because to constitutionalize this subject is to remove it from the control of the legislative power, to foreclose all future experiment and to prevent the people from dealing with it in accordance with emerging knowledge, changing needs and an altering balance of interests. As experience with the Safe Streets Act increases, it may appear that certain changes in the wiretap procedures mandated in that Act are necessary in order to improve the effectiveness of law enforcement in the area of organized crime. Moreover, the public, balancing the relevant interests, may decide that the growing threat which organized crime poses to our social health necessitates some adjustment in official wiretap procedures.

Such an appraisal may also be reinforced by a change in public values which places less emphasis on the importance of telephonic privacy. That value is not necessarily immutable or as lasting in its vitality, as *e.g.*, marital privacy. The telephone is, after all, not sacrosanct. In

some circles, a whole mythology has grown up around this rather mundane little device, investing it with almost quasi-religious significance, but it is no more a proper subject for canonization than other instruments of social life.

Under the general intent of our constitutional scheme and the provision of the Tenth Amendment, the power of decision regarding this subject rests with the people acting through their legislative representatives. It is not the design of our constitutional scheme that the Fourth, Ninth or Fourteenth Amendments should be employed to remove such important matters of policy from the domain of popular control.

POINT II

If the Court should hold that wiretapping is regulated by the Fourth Amendment, it is respectfully submitted that it should find the wiretap evidence here in issue not violative of the Fourth Amendment.

A. The telephone conversations herein did not occur in a situation of privacy and thus were not eligible for protection under the *Katz* rule even if wiretapping were within the regulatory ambit of the Fourth Amendment.

The telephone conversations herein did not occur in a situation of privacy within the definition of *Katz,* and thus would not be entitled to the protection of the Fourth Amendment even if wiretapping were within the regulatory scope of that Amendment.

In *Katz,* this Court held that the conversant in the telephone booth who shuts the door behind him is entitled to assume that his conversation will be private. But the Court made it clear that "What a person knowingly exposed to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . ." (19 L.ed. 2d at page 582).

Tested by this criterion, it seems clear that petitioner's telephone conversations were not entitled to protection.

The two conversations in question had occurred between petitioner, speaking from an outside phone, and co-conspirator Dino Conte, speaking from the phone at the Headline Bar. The telephone tapped at the Headline Bar was not in a coin booth. Furthermore, the telephone line at the Headline Bar had an extension and two portable phones (A.116; page 18, Brief for petitioner). Since petitioner "occasionally helped at the Bar on week-ends" (p. 36, Brief for petitioner; R 1187, 1889) he certainly knew the nature of the telephone arrangement at the Headline Bar. It follows that he must have been aware that his telephone calls to the Headline Bar could have been overheard on the extension or partially overheard by patrons standing near the telephone.

Thus the telephone conversations in question were not undertaken by petitioner under such circumstances as would reasonably entitle him to assume that they were private. In other words, it cannot be said that petitioner "justifiably relied" on an assumption of privacy, as did *Katz* in the privacy of his phone booth.

Moreover, since the objective conditions did not amount to a situation of privacy, it matters not whether petitioner relied on an assumption of privacy or whether the assumption was reasonable.

At the very least it may be said that petitioner has not discharged his burden of demonstration by presenting to this Court a factual record unambiguously disclosing an unjustified invasion of his constitutional rights.

A different holding in this case would provide a doctrinal justification for the claim that all privacy invading investigative devices are governed by Fourth Amendment standards.

B. If the *Berger-Katz* criteria are applied retroactively to this case, and it is respectfully urged that they should not be, then those criteria should not be enforced in their full rigor and the Court should be content with that appropriate degree of compliance which may be exacted without destroying the effectiveness of the wiretap investigative device.

It should be noted at the outset that petitioner did not raise in his appellant's brief in the New York Court of Appeals questions as to whether the wiretap order in question was supported by a showing of probable cause and whether it complied with Fourth Amendment criteria. His arguments regarding the Fourth Amendment were the different ones that (1) *Berger* required an authorizing warrant for official wiretapping; (2) *Berger* had struck down 813-a, leaving no statutory basis for the order, since the statute was thus void *ab initio*; (3) Section 605 broadened the enclave of privacy protected in the Fourth Amendment; (4) the *Mapp* exclusionary rule was applicable to wiretap evidence obtained in violation of 605.

It is true that the Court of Appeals considered the question of whether the order herein complied with the Fourth Amendment criteria mandated in *Berger* and found substantial compliance but it did not really address itself to the probable cause issue other than to declare in passing that probable cause had been shown. It is established beyond the need of citation that this Court will not consider issues not properly raised in the Court below, and although this rule is sometimes relaxed where such issues have been dealt with although not properly raised, this Court must decide whether the record herein discloses an occasion justifying a pronouncement on all of the issues pressed upon it by petitioner.

If this Court should decide that wiretapping is controlled by the Fourth Amendment and that the issues sought to be asserted by petitioner were properly raised below, and may be raised here, it will still not be neces-

sary for it to enforce all of the warrant criteria of that Amendment in their full rigor. (See: The Right of the People to be Secure: The Developing Role of the Search Warrant, N.Y.U. Law Rev., Vol. 42, #6, Dec., 1967, p. 1131; see also: 52 Cornell L.Q., #6, p. 1000.)

This Court's recent holding in the administrative search case of *Camara* v. *Municipal Court* (387 U.S. 523) is justification for a relaxation of the warrant procedure in an area of investigation where full compliance would be difficult. Indeed, the unreasonable search concept reflected in the Fourth Amendment suggests the propriety of a flexible approach.

It is argued in the next section of this Point that the procedures followed in this case were substantially in accord with those mandated in *Berger* and *Katz*. However, even if it be assumed, *arguendo*, that these procedures departed to some extent from the catalog of requirements ordained in *Berger* and *Katz*, they should still be held adequate under the rationale of the *Camara* decision.

By the very nature of the wiretapping process, it may be impossible for a warrant authorizing it to comply fully with each Fourth Amendment warrant criterion, especially that concerning particularity. These criteria are more easily adaptable to electronic eavesdropping not involving wiretapping, since it is sometimes the case that such electronic surveillance is designed to record a particular conversation, the exact nature of which is known in advance (*e.g.*, between two persons in a face to face encounter, as in *Osborn*, or the conversation of a particular conversant, as in *Katz*).

In *Katz*, this Court seemed to relax the notice and automatic termination requirements enunciated in *Berger*. A continuation of this common sense approach is necessary if wiretapping is not to be restricted so seriously so as to compromise its effectiveness and usability as an investigative tool.

While the present federal statute may seem open to improvement in this regard, it can be revised in the light of future experience, although it may be gathered from the present climate of legislative opinion that it will continue to retain substantial safeguards.

If this Court should hold wiretapping to be within the regulation of the Fourth Amendment and should apply the *Berger-Katz* criteria retroactively, the crucial question before it would concern the validity of the wiretapping in this case and whether petitioner has standing to attack the wiretap order in this Court, and not the constitutionality of the eavesdrop statute under which it was obtained. It is true that, in *Berger*, this Court went beyond the eavesdrop order, since it apparently felt it necessary to strike down the challenged statute on its face with respect to that portion of it authorizing trespassory eavesdropping. Presumably, the Court was actuated by the desire to nullify the regulatory effect of the statute in one comprehensive invalidating act, rather than to do it by examining the application of the statute in numerous particular cases and by inspecting orders on a case to case basis.

But this comprehensive approach is no longer necessary since the statute, Sec. 813-a of the Code of Criminal Procedure, does not exist, having been replaced by a new statute enacting *Berger*-type criteria. Thus it is respondent's view that the validity of 813-a and the question of whether the Order herein was obtained under a valid statute are matters of state law and not substantial federal questions. In other words, the question of whether the order was obtained pursuant to a state law or under the authorization contained in Article 1, Section 12 of the New York Constitution or under the inherent power of the issuing judge (which inherent power would seem to have been recognized in *Osborn* v. *United States*) are simply not questions of federal constitutional proportions.

With respect to the requirement of particularity, it is impossible in a wiretapping context to predict the exact content of the conversations to be overheard. However, prior decisions of this Court indicate that the particularity requirement is a flexible one (compare *Stanford* v. *Texas*, 379 U.S. 476, with *Steele* v. *United States*, No. 1, 267 U.S. 498, 504). The description provided in this case in the order was supplemented by the oral testimony before the issuing judge of Assistant District Attorney Norman Levy.

Under the law of New York, such oral testimony forms part of the wiretap order (*People* v. *McCall*, 17 N.Y. 2d 152), as the Court of Appeals noted in this case. The wiretap papers, taken together with the oral testimony, specifically named certain persons whose conversations were to be overheard, specified the crimes in which they were involved (attempted extortion, conspiracy, coercion, the communication of threats of physical violence to the daughter of the person who was the object of the extortion and assault upon his wife), and indicated the particular subject of the conversations by describing the particular crimes about which evidence was sought. (See discussion on this topic in next section of this Point.)

This degree of descriptive particularity was approved by this Court in *Osborn* v. *United States* (384 U.S. 323, 330), which was cited with approval in the *Berger* case (in 388 U.S., at 56-57). Such a degree of particularity would be sufficient to prevent investigative "fishing expeditions" since it would require a showing before a magistrate that conversations concerning specified crimes were likely to take place. Moreover, by the nature of the situation in *Osborn*, the authorities were able to describe the prospective conversation to be overheard with greater particularity than is normally the case in the wiretap context, because the person making the affidavit in support of the court order was the very one who was to participate in the conversation intended to be overheard and was thus able to specify in advance what he intended to talk about.

Since such specifity is more frequently possible in non-wiretapping eavesdrop situations (especially, those like *Osborn,* involving participant monitoring), than it is in wiretap contexts, it is respectfully urged that a more relaxed standard should be applied with respect to wiretap interceptions, assuming, *arguendo,* but not conceding, that wiretapping is within the governance of the Fourth Amendment.

Petitioner has argued that wiretapping is objectionable, and should be banned, because it permits *indiscriminate* seizure of evidence other than that specified in the order. However, it should be pointed out that the same objection may be made concerning a search and seizure. Even though a search warrant may provide that only specifically named objects may be seized, it is still a fact that once the privacy of the dwelling house is invaded by the searching officers they may examine and make notes concerning all of the belongings and property in the premises being searched, just as the wiretapping officer hears everything being said on the wiretapped telephone line.

The extent of the examination of private effects, especially in searches of offices, may be formidable (see Standards Relating to Electronic Surveillance, ABA Project on Minimum Standards for Criminal Justice, p. 89). Also indiscriminate invasion of privacy by subpoena duces tecum is permitted by law (*e.g., Brown* v. *United States,* 276 U.S. 134, which upheld a subpoena providing for production of all communications between January 1, 1922 and June 15, 1925 concerning the manufacture and sale of eighteen different types of items).

Indeed, the Courts have recognized that the searching officer may seize and use as evidence the fruits of other crimes or objects illegally possessed, so-called contraband, found during the course of his search, even though not described in the search warrant (*Zap* v. *United States,* 328 U.S. 624; *United States* v. *Howell,* 240 Fed. 2d 149; *United States* v. *Old Dominion,* 10 Fed. 2d 736; *United States* v.

Howard, 138 Fed. Sup. 376; *United States* v. *Eisner,* 297 Fed. 2d 595, 6th Cir., cert. den. 369 U.S. 859; *Johnson* v. *United States,* 293 Fed. 2d 539, D.C. Cir., cert. den. 375 U.S. 888; *California* v. *Hurst,* 325 Fed. 2d 891; *United States* v. *Barone,* 330 Fed. 2d 543; *Hester* v. *United States,* 265 U.S. 57).

It is submitted that a wiretap order would clearly be adequate if it described the conversations to be overheard in terms of the particular crimes being investigated.

While the insistence upon a high degree of particularity is of value in a search and seizure context as an effective limitation on wholesale and indiscriminate seizure, it is not a realistic and operative remedy in the wiretapping situation. The fact is that a wiretap interception picks up all conversations during the period in which it is conducted regardless of the degree of descriptive particularity in the wiretap order. The same comment is pertinent with respect to a claim that a wiretap order is too broad where it authorizes the interception and recording of the conversations of any and all persons using the phone identified in the order. Such an objection is lacking in force since even a wiretap order which limited its authorization to interception of the conversations of a few particular persons would not prevent interception of the conversations of all other persons conversing on the phone line in question. Thus an insistence on strict particularity in the description of the conversants within the scope of the order would serve no useful practical purpose. The argument that wiretap eavesdropping must restrict itself to the overhearing of particular conversations is simply another way of urging the untenable thesis that wiretapping is unconstitutional in its very nature and must be suppressed.

It is respectfully submitted that the *Berger* criteria are open to question in certain other respects.

This Court in *Berger* felt that an authorization for a two month period of eavesdropping was the equivalent

of a series of intrusions pursuant to a single showing of probable cause. It is respectfully argued that the same objection might be leveled against some searches and seizures, especially those involving searches of warehouses and other installations that may require numerous entries on separate days during the authorized period of the warrant.

Moreover, it is urged that petitioner can not attack the order here in question on that basis. The period involved in the order was no concern of his because the wiretap was on a telephone in a public bar not owned by petitioner and was not on petitioner's telephone. Nor was petitioner present in the Headline Bar during these conversations (see *Jones* v. *United States*, 362 U.S. 257). Thus petitioner has no standing to raise this objection to the order. Even if he had such standing, substantial compliance should be sufficient as to him. Where the owner of the telephone is not the attacking party, the matter may be subjected to judicial regulation by providing that where the order is extended in length, only those conversations obtained within a permissible period may be received in evidence. This alternative means of control should be accepted as a substantial compliance in circumstances such as these.

With regard to the requirement of notice, with all due respect to this Court's pronouncements in *Ker* v. *California* (374 U.S. 23) and *Miller* v. *United States* (357 U.S. 301), the requirement of notice (which was developed by custom and common law and is nowhere mentioned in the Constitution) was designed to prevent the occurrence of unnecessary violence in connection with an official entry in the execution of a search. Since there is no such entry in a wiretap situation, this safeguard against violence is simply inappropriate there. (See remarks of Mr. Justice Stewart to the same effect in his majority opinion in *Katz* v. *United*

States, 19 L.ed. 2d 584, n. 16.) It would appear that *Katz* has dispensed with these requirements for notice and automatic termination.

It is also pertinent to observe that in Respondent's view petitioner should not be permitted to attack the order herein on the basis of these two criteria, since only the owner of the phone has standing to object on these grounds. In addition, it is obvious that notice is but a means of assuring the utter ineffectuality of the wiretapping investigative device, since a person who knows his conversation will be overheard is likely to refrain from incriminating statements and to warn other persons using his telephone to do likewise. (See *Katz* v. *United States,* 12 L.ed. 584, n. 16.) Also, it is Respondent's contention that *the overheard conversations were not seized when they were overheard but only, if at all, when they were used in Court.* Of this use, all the defendants had notice.

With respect to *Berger's* condemnation of the New York eavesdrop statute on the ground that it permitted a renewal without a new showing of probable cause, it is relevant to argue here as well that, petitioner, in his attack on the order here involved, has no standing to raise this question since the tap in question was not placed on his telephone. This conclusion is all the more pertinent in view of the fact that the order in this case *was not a renewal order.*

The *Berger* decision also held that the statute in question was deficient because it did not provide for a return on the order. But in determining the validity of the order in this case (as distinct from the statute) this fact is irrelevant, because the purpose of the return, as conceived in *Berger,* was that it would prevent the police from using "seized conversations of innocent as well as guilty parties". In attacking the order herein, petitioner has no standing to raise this objection since what could be done with respect to other persons has no bearing on whether

his rights were violated. Moreover, it is well established throughout the country that the return is a ministerial act (*Rose* v. *United States*, 274 Fed. 531; *People* v. *Massee*, 38 Misc. 2d 403 N.Y.), and a failure to file a return does not void the warrant (*United States* v. *Gaitan*, 4 Fed. 2d 848). Defects in the return will not render the search unlawful (*Evans* v. *United States*, 242 Fed. 2d 535; *Rose* v. *United States, supra; People* v. *Massee, supra*).

With regard to Respondent's argument that the Fourth Amendment's standards should be relaxed with respect to eavesdropping, it is submitted that there is nothing in this approach which is inconsistent with Respondent's contention that the Fourth Amendment should be enforced in its literal meaning and not *judicially amended*. Respondent is simply arguing that if the Court *does* bring wiretapping within the control of the Fourth Amendment, then, with respect to a protected class of telephonic conversations which is not controlled by constitutional language (as are "houses, persons, papers and effects"), there is no bar to including within the Court's decision creating that new protected class, a provision that Fourth Amendment criteria shall not be enforced in their full extent where such rigorous enforcement would be inappropriate in a wiretap context.

C. The wiretap order and the manner of its execution were not violative of Fourth Amendment standards.

In Point III of his Brief, petitioner professes to discern certain constitutional infirmities in the proceedings culminating in the issuance of the wiretap order and in the manner in which that order was executed.

Petitioner argues that the testimony of Assistant District Attorney Levy in support of his application for the wiretap order was inadequate. Petitioner appears to concede that the testimony of Mr. Levy showed reasonable grounds to believe that the crime of extortion had been committed by Granello and Conte (see p. 68 of his Brief). However,

petitioner insists that Mr. Levy failed to establish the additional element that the prospective wiretap interception would "uncover evidence of the alleged crime". (This issue was not raised in the Court below, as is indicated at the beginning of the previous section in this Point.) According to petitioner, "the testimony simply revealed that Granello had had telephone conversations with Holtzman, and that one of a number of telephones used by Granello was located in the Headline Club, a place where Granello would sometimes be. No firm or continuing connection of Granello with that telephone was shown . . ."

In response to this argument, it may be said that petitioner misunderstands the rule of probable cause. That rule does not require demonstration to a certainty. (See *Rugendorf* v. *United States*, 376 U.S. 528; *Brinegar* v. *United States*, 338 U.S. 160.) It requires only such a showing as would indicate to a reasonable man the likelihood that a prospective wiretap interception will yield evidence of crime. And in a doubtful case, a warrant should be sustained (*United States* v. *Ventresca*, 380 U.S. 102). If a prosecuting agency were able to make the showing petitioner envisages it would not need any wiretap evidence.

Certainly the facts adduced by Mr. Levy before the Court sustained this minimum burden of proof. The evidence presented by Mr. Levy showed that Dino Conte managed or hung out in the Headline Bar; that Granello and Conte told Holtzman to call Granello at the Headline Bar (A 28-33); that Holtzman called and spoke to Granello at the Headline Bar (A 33-35); (pp. 13-14, Brief for Petitioner); that the monitoring of telephone conversations between the prospective victim of the extortion plot, Holtzman, and Granello by Assistant District Attorney Levy and the police, at Holtzman's request, showed that Granello was involved in the extortion scheme concerning Holtzman and that Granello instructed Holtzman to call him at the Headline Bar.

Thus there was reasonable ground to believe that Granello and Conte would continue to use the bar in question as a headquarters and as a telephonic outlet with respect to the criminal enterprise in question. Mr. Levy's testimony showed that the offenses of attempted extortion, coercion and conspiracy were actually in progress, that one assault had occurred and others were imminent. His showing exceeded the proof supporting the order in *Osborn* v. *United States* (385 U.S. 322).

These facts concerning the Headline Bar, coupled with evidence of the crimes charged and the identity of some of the participants, was certainly enough to indicate to a reasonable mind that Granello and Conte were operating from the Headline Bar and using the telephones there in connection with a scheme of extortion. The mere fact that Holtzman should have been instructed by Granello and Conte to telephone Granello there is sufficient proof that the telephone line in the Headline Bar was being used in connection with the scheme of extortion. The petitioner's claim that Assistant District Attorney Levy should have also given specific evidence that the co-conspirators conversed with each other over the said telephone at the Headline Bar is unrealistic.

Any normal person would conclude in such circumstances that conversations over such telephones between co-conspirators in the scheme was a reasonable probability, and, as it happens, such an assumption was borne out by later events.

Petitioner also seems to couple his argument in this regard with the claim that there was no showing of exigent circumstances. As is indicated in the previous section in this Point, this Court, in *Katz*, seems to have dispensed with the notice requirement. In any case, it is clear that Mr. Levy's testimony amounted to a graphic demonstration of exigent circumstances. It showed that Holtzman had

been subjected to an extortionate demand and that, in connection with that scheme of extortion, his wife had been beaten, he had been threatended with physical harm and his daughter had also been so threatened. It was vitally necessary that information be obtained as to the persons who assaulted Holtzman's wife and who made the telephone threat to his daughter in order that the safety of the Holtzman family might be assured. Indeed, it is difficult to conceive of a situation more dramatically afflicted with urgency, and it is not surprising that the Court of Appeals in this case found that exigent circumstances were present here.

Petitioner urges as a further ground of objection that the order was a general warrant since its effective period was sixty days. Petitioner also appears to echo the *Berger* rationale that such an authorized period permitted a series of intrusions. This "series of intrusions" argument has been dealt with in the preceding section in this Point. It may also be noted that the order in question was signed on July 1, 1964 and that the conversations in question were intercepted between 6:00 P.M., July 3, 1964, and 10:15 A.M., July 5, 1964. Therefore the order was only in actual effect for a period of less than four days. In view of Respondent's argument in the preceding section of this Point that even if *Berger-Katz* standards were to be applied to this case (and they should not be), those standards should be relaxed, it seems reasonable to urge that a wiretapping regime so brief and reasonable in character should be held a substantial compliance with those standards.

Petitioner also seems to object to the fact that the order authorized the interception not only of communications made by and to Granello and Conte, but also by and to other persons communicating over the telephone in question. In the preceding section of this Point, this argument is dealt with in some detail. It was necessary that the order provide to this effect because the interception in question would necessarily overhear all conversations on

the phone in question, and, if some conversations were intercepted without authorization, the interceptors would be guilty of a violation of Section 738 of the Penal Law of the State of New York.

Petitioner also claims that the order in question did not provide for the making of a return and that, in fact, a return was not made. However, the Court of Appeals, in its opinion herein, while agreeing that the warrant did not provide for a return, declared that it presumed that a return was, in fact, made "since the Defendant did not argue otherwise . . ." (21 N.Y. 2d at p. 96-97). Petitioner's response on page 77 of his Brief in this Court to this statement by the Court of Appeals is simply that it did argue in its *reply brief that the order did not provide for a return*. However, that is not the same thing as arguing that a return was not, in fact, made. Moreover, it may well be that the Court of Appeals decided that the assertion of this point in the *reply brief* did not, in the circumstances of the appeal, adequately preserve it for review. Rule [illegible] of the Rules of the Court of Appeals (McKinney's New York Court Rules) indicates that the reply brief is confined to the function of replying to matter argued in the respondent's brief.

If reasonable state procedural requirements are not observed, this Court will decline review even where the highest State Court does not expressly declare that it has refused to decide a federal question on this ground (*Mutual Life Ins. Co.* v. *McGrew*, 188 U.S. 291, 309; *Bailey* v. *Anderson*, 326 U.S. 203, 206-7).

Petitioner contends that no return was filed.

It is not true that no return was filed. A return was made to the defense counsel and the Judge prior to and during the trial.

Prior to the trial, a copy of the order, the affidavit, and in particular the sworn testimony of Assistant District

Attorney Norman Levy, upon which the order was based, were turned over to the defense counsel. Concededly, the Judge had his copy at all times.

Following study and deliberation, a long pre-trial wiretap hearing was held permitting the defense counsel a full and complete opportunity to be heard and the right to cross-examination.

At the trial the defense counsel had a verbatim typewritten copy of both taped conversations before the tapes were offered as evidence and details as to the various wiretaps were given by prosecution witness (A. 115-135).

It is submitted that a "return" was made to both petitioner and the trial judge, and that the return given was a substantial compliance with this Court's mandates. Further, the method of return did not prejudice the petitioner in any way and no prejudice has been suggested.

That a return might be made to someone other than the issuing judge or at a different time than usual is not of constitutional proportions (cf. *Osborn* v. *United States*, 385 U.S. 323).

Petitioner, on pages 78 to 79 of his Brief, advances the curious argument that "the seizure of the Petitioner's conversations was a part of a comprehensive plan in which Court orders were obtained pursuant to Section 813-a, authorizing the wiretapping of at least four telephones . . . at his trial, the petitioner was prevented from ascertaining the actual number of telephones which were wiretapped. . . . Prior to the argument of this case, we shall move this Court for an order directing the District Attorney of Nassau County to deliver to this Court, an inventory of all wiretap orders applied for, granted and implemented in the present case, as well as all of the actual tapes produced by wiretapping in this case."

Petitioner then states that the four wiretaps known to him were such a broad intrusion into the privacy of the public at large as to deprive the procedure of any semblance of due process.

It may be said in response to this strange objection that it is defeated by the elementary principle of standing. It is clear that petitioner has no standing to object to the validity of wiretap orders on telephones in which he has no proprietary interest and over which he has not conversed (*Goldstein* v. *United States*, 316 U.S. 114). Certain it is that the alleged "broad intrusion into the privacy of the public at large" is not a cognizable issue in this proceeding. While the interests of the public are a relevant factor in any regime of judicial statehmanship, they may not serve as a pretext for deciding a given controversy by an adjudication as to the rights of persons not before the Court. This Court does not sit to preside over such a domain of disorder. The judicial power having been confined in the Constitution to specific cases and controversies, the Court operates under the implied limitation that it may only decide those issues bearing on the rights of parties to the controversy before it.

POINT III

Even if Section 605 of the Federal Communications Act be viewed as barring the use of wiretap evidence in state criminal trials, that is not a valid ground for vacating the judgment of conviction in this case, because the recent enactment by Congress, after the granting of certiorari herein, of the Omnibus Crime Control and Safe Streets Act of 1968 abated and rendered inoperative the provisions of Section 605.

The provisions of 605 are not available to the petitioner herein because that section is no longer in force, having been repealed in June of 1968 by the enactment in Congress of the Safe Streets Act. Therefore under the doctrine pro-

pounded by this Court in *Hamm v. Rock Hill*, 379 U.S. 306, it follows that 605 abated and cannot validly be invoked as a ground for relief in this Court.

The rule articulated by this Court in *Hamm* v. *Rock Hill* is consistent with the long established practice of the common law. Its application in this case would have the sanction of practical reason as well as historic acceptance. For 34 years, it was the policy of the federal government and all of its agencies, judicial, legislative and executive, not to treat State wiretapping as violative of federal public policy (see discussion in the portion of this Brief concerning retroactivity) and thus it would offend the canons of reason for a federal court suddenly to reverse that policy now by enforcing 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

POINT IV

Even if it be assumed, *arguendo*, that the Fourth Amendment governs the use of wiretap evidence of the type here in issue, this Court should not give retroactive application to its decisions in the *Berger* and *Katz* cases so as to invalidate the judgment of conviction in this case. Further, the Court should not apply *Lee* v. *Florida* retroactively so as to reverse the conviction herein.

Even if this Court were disposed to bring the enterprise of wiretapping within the control of the Fourth Amendment, and even if it be assumed, *arguendo*, that 605 did not abate upon the enactment of the federal Safe Streets Act, it is respectfully submitted that this Court should not give retroactive application to its decisions in the *Berger*, *Katz* and *Lee* cases.

In *Linkletter* v. *Walker* (381 U.S. 618), *Tehan* v. *Shott* (382 U.S. 406) in 1966, *Johnson* v. *New Jersey* (384 U.S. 719) in 1966, and in *Stovall* v. *Denno* (388 U.S. 293) in 1967,

this Court established as the ruling determinant respecting retroactivity the tri-partite standard of (1) reliance, (2) whether a retroactive application would remedy a defect in the fact-finding process and (3) whether retroactive application would create stresses upon the administration of justice.

Certainly the factor of reliance is present in the situation before the Court. . .

Both the wiretapping here in question, and the introduction of the wiretap evidence in the State criminal trial herein, occurred before the Court enunciated its decisions in *Berger, Katz* and *Lee.* Prior to these decisions, state law enforcement authorities in New York (and throughout the country) relied upon the existing state of this Court's Fourth Amendment jurisprudence, which established the so-called *Olmstead-Goldman-Silverman* rule that eavesdropping not involving a physical trespass or penetration did not raise Fourth Amendment questions. These authorities also relied upon the Court's decision in 1952 in *Schwartz* v. *Texas* (344 U.S. 199), reaffirmed in 1961 in *Pugach* v. *Dollinger* (365 U.S. 458), to the effect that 605 did not bar introduction of wiretap evidence in a State criminal trial.

They also relied upon this Court's 4 to 4 decision in *Stemmer* v. *New York* (336 U.S. 963) in 1949, Justice Jackson not participating. This decision affirmed per curiam a New York Court of Appeals per curiam decision which affirmed a conviction based on wiretap evidence. This Court's *Stemmer* decision can be viewed as declaring the legality of New York's official wiretapping scheme, since the Court of Appeals relied upon *Harlem Check Cashing Corp.* v. *Bell* (296 N.Y. 15) which had expressly held the New York wiretap laws valid. *Stemmer* was not discussed in the later *Schwartz* and *Benanti* decisions. *Stemmer, Schwartz* and *Benanti* caused an understandable confusion in law enforcement circles.

The New York authorities also relied upon a pronouncement of the New York Court of Appeals, New York's highest court, in 1962 in *People* v. *Dinan* (11 N.Y. 2d 350), which sanctioned official wiretapping and the introduction of wiretap evidence in criminal trials in New York State.

They relied as well as on the public policy of the federal government. That policy was evidenced by the refusal of the Department of Justice and United States Attorneys to prosecute state officials under the Federal Communications Act for wiretapping and the use of wiretap evidence, and the refusal of a federal court in New York State to issue warrants for the arrest of State officials using wiretaps and wiretap evidence for violation of 605, upon application of a defendant in a State criminal trial. (See *Pugach* v. *Klein,* 193 F. Supp. 630, 630-41, S.D.-N.Y. 1961.)

They also relied upon the publicly expressed view of the Attorney General of the State of New York that it was his duty to defend the New York wiretapping legislation until a court of competent jurisdiction pronounced it unconstitutional.

In obtaining the wiretap order here in question, the New York authorities also relied on the permissive attitude of the Congress of the United States, which could have enacted legislation at any time prohibiting the use of wiretap evidence in State criminal trials. The fact that Congress saw fit to permit such use to continue tends to support the views of these distinguished commentators who have asserted that Section 605 was never intended by Congress to bar official wiretapping, however one may interpret its language (Hogan and Bradley, 46 Georgetown L.J., #3, pp. 421-2; Attorney General Herbert Brownell in 39 Cornell, L.Q., Winter, 1954, p. 197, n.10; 57 Colum. L. Rev. 1159, 1162; 6 Geo. Wash. L. Rec. 326, 329; 53 Harv. L. Rev. 863, 865; 26 Ill. B.J. 376, 377; 34 Ill. L. Rev. 758; 51 J. Crim. L.C. and P.S. 441, 442, n.14; 52 Mich. L. Rev. 430, 432; 15 N.Y.U.L. Rev. 279, 16 U.Fla. L. Rev. 120, 121, n.10; 24 Va. L. Rev. 451.)

Moreover, as one commentator has observed: "The Supreme Court has continually refused to reconsider" the *Schwartz* decision. "It is true that a crime has been committed, but for fifteen years the Supreme Court itself has authorized that crime. . . . It therefore seems reasonable that law enforcement officials acting pursuant to a statute . . . have the right to rely on it". (Robert M. Pitler, in Brooklyn Law Rev., Winter, 1968, p. 243.) Petitioner argues that state officials should not have relied upon *Schwartz* v. *Texas* after this Court promulgated the *Benanti* decision. In this connection, Mr. Robert Pitler has remarked: "Yet, in *Benanti* . . . the Supreme Court unequivocally stated: "Due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect" (Brooklyn Law Rev., Winter, 1968, p. 243).

It should also be pointed out that some officials followed the practice of using wiretaps merely to develop leads to other evidence and did not introduce the wiretaps in Court. It was not unreasonable for these officials, even after *Benanti*, to rely on the wording of 605 as exempting them from liability, since that wording, in its literal meaning, indicated that liability arose only where both a wiretap interception and divulgence had occurred. Section 605 reads in part: "No person . . . shall intercept any communication and divulge or publish the existence, contents . . ., of such intercepted communication to any person."

Some persons have argued that the second *Nardone* case (*Nardone* v. *United States*, 308 U.S. 338) and *Benanti* made it clear that either wiretapping *or* divulgence was a violation of 605. However, in *Benanti* (355 U.S., at p. 100, n5), this Court declared: "Because both an interception and a divulgence are present in this case we need not decide that both elements are necessary for a violation of Section 605." The *Benanti* case was a later decision than *Nardone II*.

Moreover, the United States Department of Justice and the Federal Bureau of Investigation in that department declared it to be their official position that 605 was not violated by wiretapping alone and that both tapping and divulgence were necessary to bring the statute into operation. They defined divulgence as publication outside of the governmental realm, thus viewing as exempt from the bar of the statute all divulgence among cooperating law enforcement officers. (See Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195, 197-199, 1954; Rogers, The Case for Wiretapping, 63 Yale L.J. 792-3, 1954; Katzenbach, 32 FRD 107; Hoover, 58 Yale L.J. 422-1949). It follows that reliance by law enforcement officers on the objective meaning of 605's phraseology may hardly be characterized as sufficiently unreasonable to render them ineligible for the benefits of the no-retroactivity approach.

Petitioner suffers from a signal handicap in his argument that law enforcement agencies cannot justify their reliance on *Schwartz* v. *Texas* in view of the clear indication in *Benanti* v. *United States* that the use of wiretaps by state officers was violative of 605. That heavy disadvantage is that this Court in *Linkletter* v. *Walker, supra,* adopted just the sort of approach of which petitioner disapproves. In *Linkletter,* the Court found that law enforcement had properly relied upon the Court's previous refusal in *Wolf* v. *Colorado* to mandate the exclusionary rule. This position was expounded in *Linkletter,* despite the fact that the *Wolf* case had also held that the illegal search there in question offended against the core of the Fourth Amendment which was binding on the states through the Fourteenth Amendment.

Thus even though the police officers were clearly advised in *Wolf* that they were required by the Fourteenth Amendment to conform their official conduct to Fourth Amendment standards, the Court sustained the propriety of their subsequent refusal to do so on the theory that they could

properly rely on the Court's assurance in Wolf that the Fourteenth Amendment did not also provide the specific remedy of exclusion and that evidence illegally seized need not be excluded from State criminal trials.

This Court's refusal to grant an injunction prohibiting the introduction of wiretap evidence in a State criminal trial (*Pugach* v. *Dollinger,* 1961, 365 U.S. 458) tended to reassure state officials that this Court did not really disapprove of their use of wiretaps, especially since *Pugach* was rendered without an opinion and expressly relied on the *Schwartz* case.

Furthermore, it should also be pointed out that those officials using wiretapping evidence also relied on the generally permissive attitude of the American public, which is, after all, the repository of ultimate sovereignty and the final arbiter of the direction of legislative government.

The opinion of the New York Court of Appeals in this case states that ". . . thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan,* 11 N.Y. 2d 350, *cert. den.* 371 U.S. 877; *People* v. *Cohen,* 18 N.Y. 2d 650, *cert. den.* 385 U.S. 976, rehearing den. 385 U.S. 1032.)"

These "thousands" of orders referred to by the Court of Appeals were those issued in New York State alone. It is submitted that this Court should respect the Court of Appeals' findings in this regard. It should also be noted that the Court of Appeals held that 605 did not pre-empt the field so as to render invalid Section 1423, subdivision 6 of the Penal Law of New York, prohibiting wiretapping and the copying of taped messages (*People* v. *Broady,* 5 N.Y. 2d 500) and this Court denied certiorari (361 U.S. 8).

Petitioner argues that no issue of retroactivity is involved in this case and that petitioner's conviction may be reversed by prospective application of the *Mapp* decision.

Petitioner is clearly wrong in this contention, since *Mapp* did not bring wiretapping or, indeed, any form of eavesdropping within the control of the Fourth Amendment and did not impose the exclusionary rule with respect to wiretap evidence. To urge, as petitioner does, that this case may be determined in the manner petitioner suggests solely by prospective application of *Mapp* is to perpetrate a fiction and to make constitutional adjudication the servant of unrealism.

The approach which this Court has heretofore adopted in deciding the question of retroactivity has been the realistic one of determining whether, in fact, there was official reliance upon previously recognized legal principles. It is clear that the *Mapp* decision did not declare that wiretapping was a search and seizure or was regulated by the *Mapp* rule. In the years immediately following *Mapp*, it was universally assumed that wiretap evidence in State courts was not subject to its rule of exclusion. (See *Williams* v. *Ball*, 294 F. 2d 94, 2d Cir., 1961, *cert. den.* 368 U.S. 990, 1962.)

This view was supported by the persuasive factor that the *Pugach* decision, in 1961, relied in part upon the authority of *Schwartz* in the very same term of this Court in which *Mapp* overruled *Wolf*. Moreover, it can be argued that as recently as 1963, this Court, in *Lopez* v. *United States*, 373 U.S. 427, in effect, re-affirmed the *Olmstead-Goldman* rule, which confined the operation of the Fourth Amendment in eavesdropping cases to those in which a physical trespass had occurred. In addition, the Court seems to have given further recognition to the vitality of the physical penetration rule in 1964 in *Clinton* v. *Virginia* (377 U.S. 158) (see the concurring opinion of Mr. Justice Clark).

It was not until *Lee* that this Court held that 605 prohibited the use of wiretap evidence by State criminal juries, it was not until *Berger* that trespassory electronic eaves-

dropping was held subject to the warrant requirements of the Fourth Amendment, and it was not until *Katz* that this Court gave clear indication that non-trespassory electronic eavesdropping was governed by the Fourth Amendment. Since the wiretap evidence in question was obtained and introduced in evidence before *Lee* and *Katz* and, indeed, before *Berger*, these decisions should not be applied retroactively to this case so as to declare the wiretap evidence in question constitutionally infirm or objectionable under the provisions of 605.

Tested by the other two criteria mandated in this Court's retroactivity jurisprudence, it is clear that retroactive application should not be decreed in this case. Obviously, retroactivity would not remedy a deficiency in the fact-finding process because the wiretap evidence here in issue is probative evidence of the conversations to which it pertains. Furthermore, this Court has indicated that it may refuse retroactive enforcement, even in situations where the fact-finding process may have been somewhat compromised by the application of a prior rule of law (e.g. see *Tehan* v. *Shott, supra; Johnson* v. *New Jersey, supra,* and *Stovall* v. *Denno, supra*).

In its recent decision in *De Stefano* v. *Woods* (12 L.ed. 1308, decided June 17, 1968) this Court followed the *Stovall* rule in giving only prospective effect to its rule mandating jury trials in State criminal prosecutions.

There may have been some disadvantage to the fact-finding, truth-establishing process involved in the non-jury trial procedure at issue in this Court's *De Stefano* decision, but wiretapping improves the quality of the proof in criminal trials. (See Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice, pp. 95-96.)

With respect to the criterion of unfavorable impact on the administration of justice, it is plain that this standard alone precludes retroactivity in this case. In *Tehan* v.

Shott, this Court invoked that criteria in refusing retroactive implementation of the "no comment" rule, although only six States had procedures violating such rule.

Petitioner argues that if it should be decided that this case involves a retroactivity issue, the Court should apply the retroactivity rule of *Linkletter* v. *Walker* (381 U.S. 618), which provided for a limited retroactivity by indicating that the *Mapp* doctrine was applicable to cases on direct appeal at the time the *Mapp* decision was enunciated. In this connection, it may be pointed out that the holding in *Lee* is based upon 605 and not the Fourth Amendment, as petitioner concedes on page 58 of his brief. Therefore the *Linkletter* rule involving Fourth Amendment retroactivity does not perforce afford a pertinent standard for deciding the issue of retroactivity with respect to the *Lee* rule. Also, it does not necessarily follow that the *Linkletter* rule governs all types of Fourth Amendment issues. This Court declared in *Johnson* v. *New Jersey* (384 U.S. 719) in 1966, that

> ". . . we also stress that the retroactivity or nonretroactivity of a rule is not ordinarily determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly, as Linkletter and Tehan suggest, we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question'.

It is respectfully urged that the limited retroactivity principle of Linkletter is not appropriate in this case and that this Court in *Johnson* and *Stovall* has tended to reject the limited retroactivity approach selected in *Linkletter* in favor of rules oriented toward prospectivity. In *Johnson,* this Court held that the *Miranda* rule concerning confessions should only be applied to trials beginning after the date on which the *Miranda* decision was announced. Under

this approach, the *Berger-Katz-Lee* decisions could not be applied to this case owing to the fact that the trial herein occurred before these decisions were announced.

In *Stovall*, this Court held that the *Wade* rule respecting police identification procedures should only apply to identification parades occurring after the date of the *Wade* decision. Under the *Stovall* rule, as well, the *Berger-Katz-Lee* doctrines could not be applied to this case, because the evidentiary procedure here in issue, the wiretap interception, occurred before those decisions were promulgated.

It is respectfully urged that the Court apply the *Stovall* rule in this case.

This Court's anti-retroactivity approach in the field of State criminal justice is in accord with its approach in the field of civil law, as may be gathered from the fact that *Linkletter* relied upon the Court's previous decision in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. *Chicot* concerns the question of the effect of an earlier Federal District Court decree promulgated under a statute later pronounced unconstitutional. This Court refused to apply its declaration of unconstitutionality retroactively and held that the judgment based upon the invalid statute remained in effect.

Even a limited retroactive application of the *Berger-Katz-Lee* rules would have a deleterious impact upon law enforcement. Its consequence would be that all prosecutions throughout various sections of this country which depended upon wiretap evidence, or other evidence obtained as the result of leads procured from wiretap evidence, would be seriously embarrassed or defeated.

There is no good reason why retroactivity should be enforced in this case since Congress, in the Safe Streets Act, has recently enacted a law barring private wiretapping and strictly regulating official wiretapping by criteria incorporating the safeguards mandated in *Berger*. Also, New York State has enacted a new statute containing similar safe-

guards, and official wiretapping conducted in New York State between the time the *Berger* decision was announced and the new New York statute was enacted was required to comply with the *Berger* criteria by the holding of the New York Court of Appeals in this case rehabilitating the previous New York State wiretape statute. As the Court of Appeal's decision in Kaiser indicates, such rehabilitation is in accord with the precedent of this Court. Moreover, it would seem a matter of indifference to this Court whether Berger type standards were enforced by statute or by judicial decree, so long as those standards were in effect. One might as well argue that this Court's decision in *Miranda* was an exercise in rule-making.

In rehabilitating 813-a, the Court of Appeals assumed that this Court, in *Berger,* did not strike down Section 813-a in its entirety, but only invalidated it to the extent that it related to trespassory eavesdropping.

But, even assuming that this interpretation was incorrect and that 813-a was invalidated *in toto,* whether 813-a was rendered permanently disabled by such invalidation or could be revived by a decision of the Court of Appeals rehabilitating it is a matter of State law and does not engage the corrective attention of this Court. A federal question would be raised only if State authorities attempted to enforce 813-a in a manner violative of Fourth Amendment standards.

Moreover, it is interesting to note that there is authority in federal case law and the commentary of expert opinion for the proposition that a judicial declaration of statutory constitutionality does not annul the statute, but merely renders it unenforceable. From this perspective, it may be seen that the rehabilitation or judicial validation of a previously unconstitutional law would be congruent with accepted doctrines (See Nimmer, A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875, 65 Col. Law Rev. No. 8, Dec., 1965, pp. 1394, 1412, 14, 15, 17 and 18).

The Court of Appeals refused to decree retroactivity in this case, since it felt that the purpose of the exclusionary rule—deterrence of illegal police conduct—would not be served by a retrospective adjudication. It is respectfully urged that the Court of Appeals was right and that this Court should sustain the approach there taken.

POINT V

The introduction in evidence of the wiretaps here in issue was not violative of the Ninth Amendment and that Amendment does not establish a right of privacy enforceable in the circumstances of this case.

A. The Ninth Amendment does not protect telephonic privacy.

As an alternative to his Fourth Amendment approach, petitioner argues that the Ninth Amendment, enforceable through the due process clause of the Fourteenth Amendment, imposes a complete prohibition on all forms of official wiretapping and the use of wiretap evidence in State and federal criminal trials, and thus operates as a limitation on the scope of the warrant clause of the Fourth Amendment. Apparently petitioner's position is based upon the fact that the Ninth Amendment does not authorize the granting of a search warrant (as does the Fourth Amendment) and he therefore contends that rights under its protection are absolute and are not subject to invasion by authorization of a warrant upon a showing of necessity. A Ninth Amendment holding to that effect by this Court would not only imply the invalidity of the recently enacted "Safe Streets Act", but it would also clash with this Court's holding in *Katz* that official electronic eavesdropping is constitutionally permissible where it complies with Fourth Amendment criteria.

If petitioner's claim of an absolute right of telephonic privacy under the Ninth and Fourteenth Amendments should be accepted by this Court, the implication of such acceptance will be that all national legislation permitting court-authorized official wiretapping is unconstitutional. Such legislation is based upon the commerce power (see *Pugach* v. *Dollinger*, 277 F. 2d 739). Petitioner's absolute right thesis seems inconsistent with the doctrine, long settled in the jurisprudence of this Court, that the commerce power is plenary within its proper limits. This doctrine is indispensable to the maintenance of national union. If this Court curtails congressional power to provide for the methods of dealing with a mortal threat to national commerce—organized crime—by a decision declaring an absolute right of telephonic privacy founded upon the Ninth Amendment or upon the concept of due process (which presumably would be enforceable through the Fifth, as well as the Fourteenth Amendment), it will be accepting a view out of harmony with its well established position that the reserved power exercises no independent limitation on the commerce power of Congress. (See *United States* v. *Darby*, 312 U.S. 100.)

If this Ninth Amendment right is absolute, then presumably a state law enacted (pursuant to an enabling provision of the State Constitution founded upon the reserved power of the Tenth Amendment) to confirm this right (*i.e.* a state law prohibiting all wiretap interception of telephone conversations in which a person located in the enacting state is a party) would be an independent limitation on the exercise of the federal commerce power, as, for example, where a federal law enforcement officer wiretaps under the authority of a federal Eavesdropping Act enacted under the federal commerce power.

Such a result would not be consistent with the supremacy clause or the view of the commerce power as plenary, but would seem to follow from petitioner's absolutist theory of Ninth Amendment retained rights.

A holding by this Court that a general right of privacy is contained in the provisions of the Ninth Amendment would call into constitutional question all of the other privacy-invading investigative devices employed by law enforcement officers. The practical implications of such a situation are discussed in Section B of Point I of this Brief dealing with the Fourth Amendment question.

In this connection, it may be observed that the constitutional rights jurisprudence of this Court has tended to avoid such complete prohibitions (*e.g.*, the *Miranda* case where the Court refrained from prohibiting custodial interrogation and *Berger* and *Katz* where it stopped short of articulating a total ban on electronic surveillance). Moreover, this Court, in *Griswold* v. *Connecticut* (381 U.S. 479), indicated that the rights referred to in the Ninth Amendment are recognized in that Amendment but not created there and that such rights, being enforceable through the due process clause of the Fourteenth Amendment, are consequently subject to regulation like other Fourteenth Amendment due process rights. Justices Harlan and White, of course, did not feel it necessary to invoke the Ninth Amendment, finding the Fourteenth Amendment sufficient to support the decision. *Griswold* is discussed more fully later in this Brief.

Reliance upon the Ninth Amendment as a new instrument of constitutional adjudication will open the forum of this Court to every conceivable claim of privacy against local and federal government, and will unleash upon this Court unrelenting pressure to undertake a new career of extreme judicial activism in the service of a totally novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy. The Court will be called upon to vindicate endless claims of privacy and to invade a sphere of local life beyond the ambit of its historical concerns.

That such an enhanced role for the judiciary would incite a constitutional crisis as pervasive as that of the 1930's, is perhaps not an unreasonable expectation.

It would appear that there are certain conceptual difficulties involved in bending the Ninth Amendment to the service of telephonic privacy. The language of that Amendment, in speaking of rights which were not taken from the People by the Constitution, obviously refers only to rights then in existence.

The draftsman of the Ninth Amendment, James Madison, has expressed a similar understanding in the following words:

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights *which were not placed in that enumeration;* and it might follow by implication, that *those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.* . . . I conceive that it may be guarded against. I have attempted it . . . (in) the last clause of the fourth resolution (the ninth amendment). (Emphasis supplied.) (2 J. Story, Commentaries On the Constitution of the United States, 626-27, 651, 5th Ed. 1891).

Since the telephonic instrument was not yet invented when the Bill of Rights was adopted, it can hardly be claimed that the right to private use of this instrument was within the intention of the Ninth Amendment. Thus any technique of adjudication that seeks to protect privacy by enforcing alleged Ninth Amendment rights through the due process clause of the Fourteenth Amendment, as was done in *Griswold* v. *Connecticut* with respect to a long-established right, encounters formidable obstacles in constitutional theory in this case.

Petitioner's approach is deserving of rejection on this ground alone, because he clearly indicates that the Ninth

Amendment right of privacy he is seeking to assert did not exist when the Bill of Rights was adopted. (See pp. 40, 61, 62, Brief for petitioner.) Indeed, it is the thrust of petitioner's argument that since the telephone did not exist when the Fourth Amendment was adopted, the warrant clause of that Amendment can not be invoked as authorization for the issuance of wiretap orders. Although his statement of doctrine is fragmentary, his argument may be interpreted to suggest that once the telephonic conversation became an established method of communication, a right of telephonic privacy came into effect which was protected in the Ninth Amendment. Whether such right existed by virtue of its acceptance in the community or solely by operation of the Ninth Amendment is not stated.

Moreover, with all due respect to this Court's decision in *Griswold* v. *Connecticut* (381 U.S. 479), constitutional history indicates that the Ninth Amendment was designed to operate only with respect to the *federal* government. (See "Are there 'certain rights . . . retained by the People'?" Norman Redlich, New York University Law Review, Volume 37, Number 5, November 5, 1962, pp. 805-806.) It was not intended to limit the ways in which the citizens of the several states organized the governmental power of their state governments. That this is so gains confirmation from the fact that where the Framers elected to provide for intervention by the federal government in the affairs of state government, as they did in Article IV, Section 4 in commanding the United States to insure that the forms of state government should be republican, they were quite capable of making specific provision to that effect.

The Ninth Amendment appears to conceive of rights possessed by the states and the people thereof, and it follows that if the so-called Ninth Amendment rights be viewed as including patterns of rights other than those existing when the Ninth Amendment was adopted, the states can regulate these rights in the public interest. This Court

cannot be viewed as holding to the contrary in *Griswold* since *Griswold,* unlike this case, did not involve a situation where the people, by state constitutional provision, had approved the statute under review. Indeed, the Court indicated that such regulation was constitutionally acceptable where it was not too sweeping in character. This Court has recognized the legitimacy of regulation in its jurisprudence of the Bill of Rights and the Fourteenth Amendment and there would appear even less reason to doubt it in a Ninth Amendment context seeking to enforce a right not protected in any specific guarantee of the Constitution.

In any case, if the pattern of Ninth Amendment rights be viewed as evolving rather than static, then on any reasonable theoretical analysis, it must be conceded that the sovereign People, in contriving the structure of state government, and constituting it the repository of their sovereignty, have delegated to it the authority to regulate those rights which are recognized in the Ninth Amendment. With respect to the State of New York, the process of delegation is specific and visible. In Article I, Section 12 of the New York Constitution of 1938, and in succeeding revisions thereof, the People have extended to law enforcement officials the power to obtain and use wiretap evidence.

Certainly the Framers of the Ninth Amendment and of the original Constitution (the two separate pronouncements of fundamental law being substantially contemporaneous in time), did not conceive that the Constitution should be invoked by a national judicial organ to supervise the relationships between the states and their citizens and to forbid the states from exercising such powers of local government as the People saw fit to grant them in state constitutional convention.

The theory of the Ninth Amendment urged by the petitioner is radical. If accepted, it will be the means of working a fundamental change in the federalist structure of au-

thority ordained by the Framers. It would, in effect, change our form of government from a federalist to a quasi-unitary type in which national authority (and not even national legislative authority at that, but national judicial authority) has the discretion to determine the forms and methods of local government and its law enforcement agencies.

Such a dramatic shift in the locus of governmental power would limit local individual rights as well as local governmental power. This is so for the reason that added rights to the accused granted under the aegis of the Ninth Amendment would consist of rights granted not only against state government, but also against the community of citizens that relinquished such rights (if, indeed, telephonic privacy was ever such a right) to the control of local government in order that other individual rights (e.g., freedom from criminal injury and criminal invasion of privacy) might be secured.

Thus this Court would be drawing to itself the authority to nullify the power and right of the people to choose the pattern of rights and duties which it felt would best secure that general welfare which is declared to be a ruling purpose of the Constitution in the Preamble to that instrument. Thus the local populace would be deprived of the power of democratic control over the conditions of local life in clear violation of the Tenth Amendment, the basic principles of divided sovereignty on which the Constitution is founded, and the doctrines, established in the Preamble that our form of government derives its legitimacy from the consent of the governed, and that the ultimate source of all governmental power is the sovereign people.

Since it is the people who are victimized by crime, it is they who should decide when the incidence of criminal injury has reached the point where further expansion in the rights of the accused reducing the operational effectiveness of law enforcement is unacceptable.

In arguing for an absolute right of telephonic privacy, petitioner goes Justice Brandeis one better, for even that supreme proponent of privacy doctrine conceded that there was no absolute and unqualified right to privacy in the telephonic context. (The individual should be protected against "every *unjustifiable* intrusion;" Brandeis *J*, dissenting in *Olmstead* v. *US*, 277 US 438 at 478-479 (emphasis supplied).

Since, as we have seen, the right of telephonic privacy could not have been one of those contemplated by the Framers as recognized in the Ninth Amendment, it follows that petitioner, in relying upon the Ninth Amendment, is asking this Court to create a new right by judicial fiat. This case is different from *Griswold* v. *Connecticut* where the marital right recognized by the Court was one of ancient origin and unquestioned acceptance (381 U.S. 486, 496). Petitioner's claim raises a serious question as to the authority of this Court, under the limited grant of jurisdiction set forth in the judicial article of the Constitution, to undertake this ambitious task which is urged upon it. The Constitution has merely empowered the federal judiciary to decide cases in accordance with law and to prefer federal law over local law in situations where they conflict. This judicial power and obligation to decide in accordance with law necessarily implies the auxiliary function of interpreting the law. But it carries with it no implication that the judicial functionary shall expand and amend the law so as to establish rights not recognized by constitutional language or by the People, the Framers, or the States when Ninth Amendment was adopted.

Where rights are defined in the Constitution, it can be argued with some plausibility that, in confronting constitutional phraseology which is, to some extent, vague, as is the due process clause, an adjudicating tribunal should sketch in the boundaries and frame the limits of constitutional rights by acts of interpretation, with the help of such

recognized aids to interpretation as will assist the exegetic process. But the judicial function regarding rights, as it is projected in the Constitution, is interpretive and not creative. A federal court should not, by judicial fiat, impose upon the states, contrary to local custom and preference, the Court's own conception of a vague grant, where, as in the case of the Ninth Amendment, they are not sketching in boundaries of rights defined in the Constitution but, instead, are dealing with a reference to rights already established by extra-constitutional processes.

Rights, whether they be considered as grounded in custom or in natural law, are not established by the Ninth Amendment. The best scholarship on the subject concedes that the Ninth Amendment merely recognized rights which existed prior to the adoption of the Constitution (See Patterson, "The Forgotten Ninth Amendment," page 20). The opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut* also recognizes that the Ninth Amendment is not an independent source of rights (381 US at 492).

In this connection, perhaps the most distinguished student of our public law, Dean Roscoe Pound, has observed:

> ". . . where rights not declared in terms are 'reserved' there is a question as to where is the power of defining them, and where is the power of securing them when defined. The Tenth Amendment seems to preclude definition and enforcement by the federal government except as committed to that government by the Constitution. It would seem, therefore, that these reserved rights may be defined and enforcement of them may be provided by the states, except as may be precluded by the Fourteenth Amendment, or may be defined and acquire secured enforcement by the people of the United States by constitutional amendment.
>
> Assuming that the Ninth Amendment is a general recognition of inherent or natural rights, it does

not purport to secure them. It lays down no rules such as are provided in articles I to VIII inclusive. It declares that there are natural rights but makes no attempt to define those not expressly provided for in the Bill of Rights nor to provide for securing them. But the states have the attributes and powers of sovereignty so far as they have not been committed to the federal government by the Constitution. So far as inherent rights are not committed to the federal government, defining and securing them is left to the states or to be taken over by the people of the United States by constitutional amendment. Are not the Ninth and Tenth Amendments authority for state legislation to define and secure inherent reasonable expectations in life in civilized society as it is today."

("The Forgotten Ninth Amendment," *supra,* page VI.)

If Petitioner's Ninth Amendment approach be accepted to the extent of conceding, *arguendo,* that Ninth Amendment rights are evolving rather than fixed and immutable, then it is pertinent to inquire as to the source of the rights within the scope of the Ninth Amendment if the source is not, as we have seen, the Amendment itself. One possible source is local custom. Some might argue that rights so elaborated are subject to change at the pleasure of the populace whose customs are invoked although not, by definition, at the Court's instance.

If it be argued that the local rights of a particular time were federalized by the Ninth Amendment and, through constitutionalization, rendered immune from change by the community in which they arose, then it follows that the Court certainly can not alter or add to them. Some observers would contend that such a limit on local sovereignty is inconsistent with the provisions of the Tenth Amendment. From this perspective, it would seem that since the Constitution did not define or enumerate the preexisting rights which it referred to in the Ninth Amendment, it can scarcely be said that such rights were "established" or federalized

by the Constitution, beyond the power of evolving local custom or policy to change.

Even if this view be accepted, it would not necessarily follow that the Court has the power to enforce these rights, as may be gathered from Dean Pound's statement (*supra*). If *Griswold* be viewed as assigning this role to the Court (and *Griswold* is not authority for the proposition that Ninth Amendment rights are evolving) that would still not relieve the Court of the obligation of accurately discerning community standards. It is clear that "the traditions and (collective) conscience of our people" envisaged in *Griswold* as the source of rights, do not indicate general and uniform acceptance of an absolute right of telephonic privacy as against official interception in the State of New York. That this is so is evidenced by the permissive constitutional and statutory provisions which were in effect in New York at the time of the wiretapping herein and in existence now. Nor can the *Berger* type safeguards in the present New York law be considered part of New York's local tradition, because these standards were enacted to satisfy this Court's *Berger* rules. And the common law of New York has rejected the general right of privacy doctrine (see *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 583).

While the custom in other states is not relevant, it is interesting to note that they have not uniformly accepted prohibitions on official wiretapping. (Standards Relating to Electronic Surveillance, American Bar Association, Project on Minimum Standards for Criminal Justice, pages 19-20.) The truth is that public opinion does not support prohibitions on official electronic surveillance. (A. Westin, Privacy and Freedom, p. 207.)

Another possible source of the rights referred to in the Ninth Amendment is the body of "natural rights" theory. Modern proponents of this theory might seek a new role for this immemorial tradition by offering it as the content of a new and more influential Ninth Amendment. But, that special variant of the doctrine of natural rights employed

to justify restrictions on the vital regulatory activities of the State, has been rejected by this Court. (Corwin, The Constitution and What It Means Today, 12th rev. ed., pp. 234-5.) If its career were revived, it might be seized upon as the legitimizing ethos for reactionary interests, as it was in the past.

Also, if one accepts the concept of natural rights in its historical dimensions rather than in its restricted aspect as the vindicator of narrow ideologies, it must be conceded that such a right as freedom from official telephonic eavesdropping is nowhere recognized in the social life of this Nation. If there be such natural right, it must be confirmed by historic growth and not judicial imagination. Its recognition in positive law must emerge by autochthonous development from the creative impulses of society.

Furthermore, the natural rights philosophy affirms that such rights are only those which are universal in character, and it follows from this that they must have wide recognition throughout the Nation or, by definition, they are not universal natural rights. Since the limited public sentiment against official wiretapping in this country has never attained the status of a generally accepted value, it can hardly qualify as evidence that a universal natural right to telephonic privacy is a part of our national tradition. Certainly no such right is recognized in New York, as we have seen.

It is respectfully prayed that this Court consider the dangers of invoking the Ninth Amendment in this case. If it declares that a right of telephonic privacy is recognized in the Ninth Amendment, its decision might be interpreted as saying that all evidence obtained by non-physical invasion of a situation of privacy must be excluded from evidence in State criminal trials. Indeed, this result was anticipated by one commentator before *Berger* and *Katz* were pronounced. (See, Luis Kutner, 51 Marquette, L. Rev., No. 2, pp. 121, 136-7.) This same commentator sets forth an awesome list

of interests which might be brought within the protection of the Ninth Amendment. If these suggested items, and others certain to be urged upon the Court, were accepted as an agenda for judicial action, the resulting imbalance in the traditional federalist patterns of sovereignty could justly be described as the most far reaching innovation in governmental structure since the establishment of the principle of judicial review.

POINT VI

The Due Process Clause of the Fourteenth Amendment affords no basis for reversal of the judgment of conviction.

A. The Due Process Clause of the Fourteenth Amendment does not protect a pure due process right of privacy independent of the specific guarantees of the Bill of Rights.

Let us assume that this Court should hold that wiretapping is not governed by Fourth Amendment standards. Does petitioner still present a claim cognizable under the due process clause, i.e., does he have a pure due process right of telephonic privacy and has it been invaded? If so, must the Court reverse? Respondent submits that the Court should not disturb the judgment in this case. Official wiretapping is a policy matter. It is not of such a nature as to require that the Court carefully supervise local police eavesdrop activity. In any event, Congress has provided for national legislative control in the Safe Streets Act.

It may be argued that this Court's supervision is required, e.g., in enforcing the Commerce Clause of the Constitution in order to prevent the states from burdening, by regulation or excessive taxation, that process of interstate commerce which is the life's blood, of a national society. This judicial approach is simply not necessary in the context of law enforcement, since it is a matter of

indifference to the objective of national union and stability whether localities permit official eavesdrops in support of their crime control activities and what procedures they sanction in connection with the pursuit of these activities. To the extent that our people wish to deal with this problem in a national frame of reference, they may employ the machinery of the national legislative establishment.

This Court has not yet taken the momentous step of finding a general right of privacy in the Fourteenth Amendment. While various commentators have urged that the due process clause be employed to vindicate a constitutional principle of privacy independent of the provisions of the specific guarantees in the Bill of Rights, the Court has not seen fit to cut itself adrift from the stable referents of the first eight Amendments and to enter a vague and formless domain of policy without the guidance of specific standards. It is respectfully submitted that the Court should re-affirm its adherence to that approach in this case.

An examination of the decisions of this Court which are sometimes referred to by commentators as its privacy jurisprudence, reveals that the Court has protected interests conceptually different from that of telephonic privacy. In its decisions approving local action protecting civic repose against the blaring of a sound truck (*Kovacs* v. *Cooper*, 336 U.S. 77) and protecting domiciliary repose against the vexatious annoyance of door to door solicitors (*Breard* v. *Alexandria*, 341 U.S. 622) the Court was simply pronouncing the right of local government to regulate in the general welfare. Moreover, the interests involved in these cases, i.e., the interests in repose and freedom from annoyance, are fundamentally different in character from the interest in telephonic secrecy. The claimant of the right of telephonic privacy does not assert a right to be free of vexatious irritations. On the contrary, it is the essence of the telephonic interception that is performed in silence and without the knowledge of the conversant.

In *Meyers* v. *Nebraska* (262 U.S. 398), the Court was affirming the positive rights to engage in foreign language study and to indulge in a lawful vocation, that of teaching, and in *Pierce* v. *Society of Sisters* (268 U.S. 310) it was declaring the parent's traditional freedom of decision and action in the upbringing of his children. Neither of these decisions vindicates a privacy interest. Both pronounce a "freedom to" rather than a "freedom from." And in *Pub. Utilities Comm.* v. *Pollak* (343 U.S. 451) this Court held that the due process clause of the Fifth Amendment did not protect a right to be let alone.

Even the common law of torts has been slow to recognize, under the right of privacy concept, the special sort of interest for which petitioner here seeks constitutional protection. Dean Prosser, analyzing the many tort decisions founded upon the right of privacy concept, concludes that they may be classified under four categories having no common conceptual core: (1) intrusion upon solitude or seclusion jeopardizing mental tranquility; (2) public disclosure of embarrassing facts harming reputation; (3) placing the victim in a false light by publicizing false information damaging reputation; and (4) appropriating another's name or image or artistic or intellectual creations for economic benefit so as to invade his proprietary interest in his own personality. (Prosser, Privacy, 48 Calif. Law Rev. 383, 389, 402). At other times, Dean Prosser has reduced the number of categories to three, but, in any event, has concluded that the right of privacy is not a separate and distinct tort with its own special conceptual essence.

It is obvious that none of these interests are asserted or assertable here (even if the Constitution's Fourteenth Amendment could be said to enact a partially later developed tort law). The interest in tranquility is not involved, since petitioner, while speaking over the telephone, was not aware that an interception was occurring. The public disclosure category is not involved because both

that form of action and the action for disturbance of tranquility have been applied only to the actions of private persons, and not to officials enforcing the criminal law. If these categories of tort law were extended to public officials, it would be impossible to operate a system of justice, since it involves, at virtually every stage, the sort of consequences envisaged in these tort categories. These same observations pertain with respect to Dean Prosser's third category, placing in a false light before the public, and his fourth category, appropriation of a proprietary interest in personality for the economic benefit of the appropriator. These categories are simply irrelevant to the law enforcement context.

Professor Bloustein, another leading authority on the right of privacy, attempts to extract a conceptual nucleus from all of the special interests which have been classified under the privacy concept, but the organizing principle he finally arrives at as the essential interest in privacy is so vague, i.e., human dignity, that, if accepted in constitutional adjudication, it would authorize the protection of an endless range of interests as varied as those multitudinous occasions of dignity-infringement which are the everyday result of government's operation. (See Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 971, 973, 981, 989, 993.

Nor does this Court's decision in *Griswold* v. *Connecticut* pronounce a due process right of privacy. Some commentators have read *Griswold* v. *Connecticut* as standing for the proposition that the due process clause of the Fourteenth Amendment enforces a right of privacy against the states. They have viewed the decision as prohibiting the intrusion of official power into the privacy of the marital relationship. It is submitted that the view of *Griswold* which conceives of it in terms of privacy analysis is missing the doctrinal essence of that decision.

In addition to relying on the "too drastic means" test (which this Court has heretofore applied in First Amend-

ment contexts rather than in due process cases—see *Ratner*, 116 U. of Pa. L.R., #6, April, 1968, pp. 1082, 84, 86), *Griswold* merely re-affirms that well established tenet of due process jurisprudence that the police power may not express itself in the regulation of social situations beyond the ambit of its authority or by a regulatory means ill-adapted to its objective. It does no more than restate the traditional conception that the regulatory initiative of the State must confine itself to those activities of social life which are within the power of government to treat.

This Court in *Griswold*, if I do not mistake its meaning, simply said that it would not permit the limitation of the *freedom of* marital *decision* in the circumstances presented in *Griswold*, since the alleged legislative purpose—the prevention of marital infidelity—though a valid purpose of governmental regulation, was sought to be achieved by regulatory means which were too sweeping in their reach and which invaded an area of personal autonomy beyond the claims of sovereignty thus suggesting an unacceptable implicit purpose. In the *Kaiser* case, the situation presented is fundamentally different in its legal nature. In *Kaiser*, the machinery of criminal investigation validly may be employed, since its animating purpose—the enforcement of the criminal law—is constitutionally acceptable and since the machinery invoked is discriminately adapted to that purpose.

While the Ninth Amendment was cited in *Griswold* to show that married persons had an enforceable marital right, at least as against a statute that sweeps too broadly, that right was not a right of marital privacy, but a right of marital freedom of action, i.e., the right of married persons to indulge in marital sexual relations in the manner they choose and to use contraceptives in the conduct of those relations. It was a "freedom to" do something, not a "freedom from" something. (For another application of this dichotomy, see Beaney, The Constitutional Right of Privacy, 1962 Supreme Court Review, p. 249.) This no more

involves a right of privacy than the right of married people to determine how they will talk to each other in private or in public. Obviously, such rights are not absolute. Where a husband, for example, imposed upon his wife against her will a method of sexual intercourse that resulted in serious bodily harm or death, he could be held legally accountable. On the same principle, a private conversation between a husband and wife consisting of a conspiracy to murder could also be the subject of criminal punishment.

There is no difference in principle between the *Griswold* holding and a decision which, for example, declares that the organized state may not dictate the color of the clothing worn by its citizens. The intervention of state power into this domain of personal decision would be objectionable because it would be an attempt to bring within the cognizance of official power matters which, under our theory of government, are beyond the control of the state.

In the example just given, it would make little difference whether the regulatory measure in question sought to preempt the power of personal decision with regard to clothing worn in public or in private. In either case, the State has bent its sovereignty to a use foreign to its nature and it matters not whether the regulatory means chosen to enforce the assertion of sovereignty are privacy-invading or not.

It is true that the Court in *Griswold,* in Justice Douglas' opinion, in which Justice Clark joined, also mentioned with distaste the possibility that the privacy of the marital domicile might be invaded by the investigative machinery of the criminal law but the consideration which made this prospect distasteful was the implied premise that such invasion would be in the service of an objective beyond the power of the State to achieve. Certainly this Court would not have viewed as objectionable an investigative invasion prompted by the State's enforcement of the normal substantive provisions of its criminal law.

There is nothing in the *Griswold* decision which would bar the search of the marital bedroom, provided that such a search was authorized by a warrant obtained through a showing that there was probable cause to believe that such a search would yield evidence of a crime within the legislative power of the State to punish. *Griswold* does not hold that marital privacy or any other kind of privacy cannot be invaded by the devices of official investigation; it simply declares in its dictum that the investigative power of the State can not be unleashed to assist the discharge of a governmental regulation beyond the ambit of the police power. It is specifically declared in *Griswold* that adultery, fornication and sexual misconduct may be dealt with by the criminal law (381 U.S. at 498, 9).

Griswold may be viewed either as a re-affirmation of the well established "too drastic means" rule or the "improper legislative purpose" principle. Presumably, the Court concluded that the legislative purpose suggested by the sweeping regulatory means differed from that which the statute purported to serve. The opinions of Mr. Justice Douglas and Mr. Justice Goldberg are based on the theory that penumbras of the First, Third, Fourth, Fifth and Ninth Amendments grant a fundamental marital right enforceable through the Fourteenth Amendment, which guarantees to married couples the right to decide for themselves whether or not to use contraceptives.

It is, therefore, fair to say that the deeper thrust of *Griswold* is not understandable in terms of privacy analysis and that the case, in its ultimate significance, represents an affirmation of classic principles. Indeed, it has been suggested that even the penumbra technique whereby the Court arrived at the interest to be protected was not an exercise in legalistic innovation (See Lewis, the High Court: Final . . . . But Fallible, 19 Case Western Reserve Law Review, #3, April, 1968, page 530).

In the light of the foregoing considerations, it is of significance to observe that the government in *Kaiser* did

not seek or attempt to *regulate* telephonic privacy; it only attempted to enforce the criminal law. The criminal laws enforced in this case have long been accepted in our constitutional tradition and can hardly be regarded as too sweeping or drastic. Since such enforcement is a valid, indeed fundamental, objective of the politically organized society, the invocation of the investigative device of wiretapping to assist that enforcement was constitutionally unexceptionable. This follows from the well established principle that government may use any technique of execution reasonably related to a valid governmental objective, provided that technique is not so heinous in its nature as to offend the conscience of mankind (*Rochin* v. *California*, 342 U.S. 165; *Irvine* v. *California*, 347 U.S. 128; *Schmerber* v. *California*, 384 U.S. 757; *Breithaupt* v. *Abram*, 352 U.S. 432), because the state's residual power of government gives it discretion to determine its own criminal procedure (*Cole* v. *Arkansas*, 338 U.S. 476; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Whitney* v. *California*, 274 U.S. 357; *Kay* v. *U.S.*, 303 U.S. 1; *Hoag* v. *New Jersey*, 356 U.S. 464; *Hurtado* v. *California*, 110 U.S. 516). Since the New York wiretap law here involved was not a regulatory Act, it can not be said to "deprive" of "liberty" within the meaning of the due process clause.

A regime of wiretapping under an official wiretap statute like 813-a and the individual instance of tapping here involved are "in the interest of the community" (as will be shown presently) and so, under the established due process jurisprudence, would be justifiable invasions of telephonic privacy even if that privacy were an ingredient of the concept of liberty recognized in the due process clause. But it is suggested that it is not. Liberty implies freedom of action, freedom to do something; it implies that government cannot limit freedom of action, except in a good social cause; it does not suggest that subtle intrusions on privacy which do not limit individual freedom of action are within the control of that clause. It is true that, under

reigning doctrine, the Fourth Amendment is held to be incorporated in the due process clause of the Fourteenth Amendment but the Fourth Amendment is not a privacy law, as is shown in Section C of Point I in this Brief. It forbids seizure of person or property without compliance with the standards it mandates just as the due process clause forbids deprivation of a person's freedom or property without compliance with due process standards.

The *Griswold* penumbra approach is inappropriate here. The Third Amendment does not protect the same sort of interest as is asserted by those demanding telephonic secrecy. Like the Fourth Amendment, it seeks to prevent disruption of domiciliary repose and seizure of property. That the First, Fourth, Fifth and Ninth Amendments do not protect such a secrecy interest, is shown elsewhere in this Brief.

In *Irvine* v. *California* (342 U.S. 165), state officers had committed a trespass in order to plant a microphone in the bedroom of defendant's residence and had used the eavesdrop evidence so obtained as the basis for a conviction for bookmaking. This Court declared that the eavesdrop there in question was outrageous and violated the core of the Fourth Amendment, which had previously been held in *Wolf* v. *Colorado* to be enforceable through the Fourteenth Amendment's due process clause. However, the Court felt constrained by the *Wolf* Court's rejection of the exclusionary remedy to decide that due process did not require *exclusion* at the *trial* of this illegally obtained evidence. The Court said that the so-called "shocking" to "the sense of justice" exception to the *Wolf* rule of non-exclusion in Fourth Amendment cases which was articulated in *Rochin* v. *California* (342 U.S. 165) applied only to situations where the evidence was obtained by the commission of physical brutality on the person of the accused. In view of this holding in *Irvine*, it would appear that there is no pure due process right to freedom from official eavesdropping. That this is so may be inferred from the fact that the eavesdropping involved in *Irvine* could not have been

justified as a proper exercise of the police power in view of the Court's unfavorable characterization of the trespass by which it was effected. (It is, of course, possible to view the case as standing for the proposition that even where official eavesdropping is violative of a due process right, that principle does not require that evidence so obtained shall be barred from use at the trial. This point will be discussed presently.)

Thus in view of *Irvine,* there is no reason to suppose that the interest in privacy as against official eavesdropping is cognizable under the due process clause. It is true that the doctrinal framework of *Irvine* is not elaborated in terms of a privacy analysis. However, the holding in *Irvine* would appear to be totally inconsistent with the view that such a right of privacy is within the protection of the pure due process standards of the Fourteenth Amendment and exists independent of any alleged Fourth Amendment basis for such a claimed right of privacy.

The language of the majority opinion in *Rochin* would seem to confirm this analysis. In, *Rochin,* the Court reversed a conviction founded upon evidence obtained by a forcible pumping of the defendant's stomach. There Mr. Justice Frankfurter said:

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. *We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers* and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record" (emphasis supplied).

The Founding Fathers never conceived of a generalized right of privacy as against law enforcement investigative activities and certainly the Fourteenth Amendment was not

proposed or adopted for this purpose. Even if it be conceded, *arguendo,* that that Amendment was enacted to incorporate the Bill of Rights, that intention, at most, could only have contemplated those rights in the form in which they then existed, with the breadth of guarantees then recognized. None of the specific guarantees provided for, nor were viewed as providing for, the right of telephonic privacy. If we accept the novel theory that the Constitution conferred a broad right of privacy, then it is difficult to explain why the adopters of the Bill of Rights framed specific guarantees granting specific rights without mentioning the right of privacy and why the draftsmen of the Fourteenth Amendment did not give it explicit recognition so as to remedy this deficiency in the Bill of Rights.

If this radical doctrine of privacy be accepted, then it follows that every type of privacy—invading activity indulged in by the police is violative of a right of privacy embodied in the due process clause of the Fourteenth Amendment.

In applying First Amendment guarantees through the Fourteenth Amendment, this Court was at least applying rights which had received explicit Constitutional recognition. To read the right of privacy into the Fourteenth Amendment is to create a right out of whole cloth without the assistance of any standards to guide adjudication in its determination as to which of the innumerable types of interests classified under the concept of privacy are within the Fourteenth Amendment and under what circumstances.

This is the formula for constant conflict between the Court and the agents of local sovereignty. In view of the pervasive character of necessary governmental regulation in the modern world and the investigative activities auxiliary to the exercise of the regulatory power, it may confidently be expected that a judicial recognition of the Fourteenth Amendment as the source of a right of privacy would inaugurate an unlimited flow of claims against local and national government. If the Court acted boldly in redress

of those claims it might well effect a fundamental change in the structure of governmental power and in the relation of government to the people.

In such a situation there is always the danger that, unobtrusively and by a slow process of attrition, the adjudication of claims of privacy having significance far beyond the limited context of the special controversy, may undermine the regulatory process by which the disorder and complexity of a highly interdependent society is brought within the conscious and coordinated control of society's chosen agencies of adaptation. And once such a regime of adjudication is inaugurated, it may be difficult to avoid such a result.

It may also be observed that even if it be assumed, *arguendo,* that the private right of telephonic privacy is recognized in the common law and in popular custom, that does not mean that such a right is protected by the Fourteenth Amendment. The due process clause of that Amendment does not protect every conceivable variety of interest, but only those that may be said to have attained the status of fundamental rights.

In *Griswold* v. *Connecticut,* Justice Goldberg conceived of rights enforceable through the Fourteenth Amendment as being comparable in ranks to rights enumerated in the Bill of Rights. This Court, in *Griswold,* seemed to accept the premise that such rights must be "so rooted in the traditions and conscience of our people" as to be truly fundamental and this approach is certainly in accord with the position that the Court has consistently maintained. It can hardly be said that the interest in being free of court-ordered official wiretapping, if recognized as a right, would be a right as fundamental as those in the Bill of Rights. It is surely reasonable to insist that a judicial tribunal may not recognize such a right where it does not really exist in the community conscience and then exalt it to the level of an organic imperative by constitutionalizing it.

There is authority to the effect that the due process clause of the Fourteenth Amendment does not secure a right of privacy (*United States* v. *Goldman*, 118 F. 2d 310; *Travers* v. *Paton*, 261 Fed. Supp. 110).

Petitioner asks this Court to violate its most hallowed theoretical precepts and to propound the revolutionary thesis that the Constitution ordains an absolute right of privacy which will not yield to transcendent considerations of public welfare. The police power principle of necessity, sometimes referred to as the emergency power, would seem to pose a formidable doctrinal impediment to the acceptance of petitioner's standpoint. This doctrine would justify official wiretapping where necessary in the public interest just as it would authorize a municipal fireman to destroy a house in the path of a fire. If an owner's property can be invaded and even destroyed for a public purpose under the sanction of necessity, it seems frivolous to argue that a telephone wire could not be invaded under similar circumstances. It is respectfully submitted that the facts of this case, and particularly the threat of physical danger to the victim of the extortion plot and his daughter, clearly amount to a situation of necessity.

The claim of privacy here urged upon this Court is new in conception. It was unknown in earlier times and traces its genesis to the increasing complexity of a mass society. It was not a notion within the contemplation of the Framers of our Constitution and, even now, it has yet to win its way to general social or legal acceptance. In these circumstances, it is respectfully urged that the interest in telephonic privacy, like other newly emergent interests, should seek its recognition in the domains of legislation and public opinion. Its claim of right has not

B. This Court should refuse to find an absolute right of privacy as against law enforcement in the Due Process Clause of the Fourteenth Amendment because such a right is indefensible on either philosophical or practical grounds.

The absolute privacy thesis urged by petitioner suffers from the deficiency of the partial view. It insists upon the privacy of that limited class of persons who would be subject to telephonic interceptions under the safeguards of new laws, while ignoring the privacy of those victims of crime which can only be protected by official wiretapping.

To view the problem of constitutional decision in narrowly individualistic terms is to commit that sin of political empiricism against which Professor Hans Morgenthau has so eloquently inveighed. It is to ignore the wider bearings of the problem under consideration. It is to see the claims of freedom in an excessively restricted frame of reference and to ignore the profound lesson of modern history: that social freedom is maximized only by that strategy of judgment which inquires as to the factual results of alternative forms of decision and the impacts these will have on all of the interests whose freedoms are at stake in the act of decision. To see the judicial task as solely one of enhancing the freedom of the individual suitor or the interest he represents, regardless of the overall effect on social freedom and well-being, is to accept the rationale of a more primitive stage of legal development.

As one scholar has recently observed in commenting upon the concept of natural law: "Its remnants are yet to be seen as we proceed with a new stage of legal growth and development, sometimes described as the stage of socialization of the law—as we pass from a society characterized by contractual relations, with free individual self-assertion as the end of law, to a new relational society conceived in terms of new rights and duties, or, to reverse

the famous phrase of Sir Henry Maine, "from contract to status". (James A. Gardner, Legal Idealism and Constitutional Law, Villanova Law Review, Fall, 1964, Vol. 10, #1, page 38).

Viewed in this perspective, it may be seen that the school of legal thought which insists upon expanding the freedom or privacy of one class (e.g., the criminal accused) at the expense of society as a whole or without regard to the freedom or privacy of other classes in the community is really reactionary, rather than progressive, and seeks to revive an ideology which was decisively rejected by this Court in the realm of economic policy in the constitutional revolution of the 1930's.

The political theory upon which the Constitution was founded was the social compact—natural rights doctrine, which viewed political society as that consciously created agency of the community to which were entrusted by its members only so much of their natural rights as was necessary to enable that agency to protect the remainder. Individual rights were viewed as logically and naturally prior to society and superior to all those claims of government which did not arise from the performance of these minimum functions for which government was constituted. This peculiar adaption of natural law theory was suited to an age of unbridled individualism but, as society advanced to a higher plane of interdependence, the attempt by forces of special privilege to invoke its justification was rejected by this Court as the instrument of a retrograde jurisprudence. This obsolete system should not now be revived by inadvertence. This is not to suggest that there is no theoretical or practical merit in the natural law standpoint as it has developed outside of the field of constitutional law. It is only to argue that society is not well served by a variant of that school of thought which, violating the intention of the seminal thinkers who were its intellectual fathers, sterilized that viewpoint of its recognition of the organic nature of society and restated

the theory in the context of a naively individualistic political philosophy which viewed society in atomistic terms.

It is one thing to champion an absolute individualism where one is merely asserting those traditional categories of rights which were clearly ordained by constitutional language and accepted from the very beginnings of the Republic. It is another to insist upon this approach when favoring an expansion in the rights of the accused or some other class which is unrecognized by constitutional language and unknown to constitutional tradition. Where a constitutional court pursues its role as innovator, it ought to accept the guidance of a more enlarged conception and the assistance of a more careful methodology. It should fashion for itself a tactic of decision which takes due account of the ethos of a relational society so that the judicial function may constitute itself the servant of a wider freedom rather than the agent of a rote and inflexible parochialism.

As it comes to its task, it should be ever mindful of T. H. Green's sovereign insight that rights are the product of organized society and thus subject to those adjustments in their content and extent necessary to the health and well-being of that society.

This Court has held that where First Amendment values conflict with the values of privacy, the latter must give way up to the point where freedom of expression is abused. (*Time, Inc.* v. *Hill,* 87 Sup. Ct. 534). The constitutionally preferred position of First Amendment rights has been pronounced even in cases where the material sought to be published did not involve the reporting of news or the expression of political or social opinion, but rather was designed simply to provide amusement (*e.g., Time, Inc.* v. *Hill, supra; Jenkins* v. *Dell Publishing Co.,* 143 Fed. Sup. 952, aff'd 251, Fed. 2d 447, 3rd Circuit, cert. den. 357 U.S. 921). Indeed, one commentator has declared that this Court has shown greater deference to speech and press

in right of privacy suits than in tort suits (Privacy, Defamation and the First Amendment: The Implications of *Time, Inc.* v. *Hill*, 67, Colum. L.R. #5, May, 1967, p. 939).

The rationale of preferential treatment for free expression is its indispensability to the progress and stability of the free society. A similar mode of analysis confirms the centrality of the law enforcement process. It is the obvious function of law enforcement to protect private life against the disruptive effects of criminal invasion. Only as it does its work effectively can the individual mark off for himself that domain of privacy within which his creativity may be nurtured. It is the paradox of democratic theory that selective invasion of this domain of privacy by government for good cause shown is a necessary condition of the general and continuous maintenance of those circumstances of external public order through which the structure of privacy is sustained.

But the significance of law enforcement in the contemporary age transcends the narrow conception which sees it as the mere engine of social tranquility. It has other crucial functions to perform in the service of democratic institutions and, to the extent that this mission is discharged effectively, it may justly be deemed one of the great democratic corrective forces of the free society.

In a society organized to permit the untramelled advocacy of political doctrine by the tactics of violence and disorder, each ideology would press its claims to the limit, disdainful of the progressive values, partial truths and limited advances in social outlook embodied in competing political schools of thought. Political life would become a continuous exercise in intimidating vocal combat and clamorous special pleading. Such a regime stifles free trade in ideas. It is hardly conducive to that balanced and tentative discourse in which the subtle contours of truth are progressively disclosed through orderly, and cooperative public inquiry and disciplined judgment.

Through the enforcement of a democratic scheme of authority, each shade of opinion is permitted to contribute to public discussion that peculiar dimension of truth which its special standpoint has discovered, and the process of free politics becomes a vehicle for coalescing the limited truths of sectarian outlooks into a broader and expanding body of knowledge and principle. Only in the society in which law enforcement does its work effectively, can the characteristic process by which progress emerges receive the fullest tolerance of its operation.

Those who, in the name of some narrow and temporary view of progress, would stand insurgent against the forces of law which are the guarantors of a broad and orderly realization of progress, are really the enemies of the democratic society rather than its friends.

Law enforcement has still another vital function to perform as a democratic corrective force.

In the contemporary age, as never before, crime is one of the great social problems of American society, not only because it menaces the physical safety of our people but, more, because organized crime threatens to pervert our economic and political institutions and put them under the control of elements who would use the power so derived to exploit the citizenry rather than to seek its benefit.

When such elements achieve social power, they use private and public institutions to fasten upon society a regime of exploitation rather than to serve society as agencies subject to its control.

Crime constitutes not only a direct infringement on physical and economic well-being; it may also provide the devices by which social power is removed from the possession of the people, thus denying them the means of organizing society's processes in accordance with their own ideals and of exercising a meaningful control over their own destiny.

In this sense, organized crime is deeply anti-democratic. As crime becomes progressively more organized and extended in the scope of its influence, it takes on the aspect of a second government, weakening the vitality of legal government and exerting a form of social control in some areas of activity approximating that of a formal dictatorship—only without the high degree of visibility which subjects even dictatorships to some degree of popular control through its tendency to galvanize and focus public attention and sentiment.

A democratic society whose central processes are susceptible to perversion and capture by venal forces of self-interest is a democracy in name only since, in fact, the goals and values which shape the direction and form of communal life are, to a great extent, no longer subject to the consent of the governed.

Those familiar with the activities of organized crime in the fields of banking, securities and other types of legitimate business and in using such devices as usurious loans and control of stategic labor unions and agencies of local government to ruin or enslave legitimate businessmen, are aware of the increasing effectiveness with which organized crime has imposed its will on various sectors of our society. (See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, pp. 187-190; Standards Relating to Eelectronic Surveillance; American Bar Association Project on Minimum Standards for Criminal Justice, General Commentary by Prof. G. Robert Blakey, pp. 31, 37, 38, 40, 41).

Law enforcement in present-day America is not merely the neutral function of preserving the external conditions of public order. On the contrary, it should be one of the most significant means of insuring that the freedom that the open society confers shall not be used to distort its essential nature or to subject it to that morbid derangement

of function which violates the ultimate ideas and assumptions on which it is founded.

The same rationale which justifies preferred status for freedom of expression corroborates the primacy of that mechanism of enforcement which insures the conditions in which free expression and the democratic process do their work most effectively.

It follows that penal law enforcement deserves a status of pre-eminence in the pantheon of constitutional values, and, in its confrontation with the claims of privacy, is entitled to an indulgence which can not reasonably be extended to other types of official activity and unofficial activity invading the sector of privacy. Therefore the balances of interests reflected in other phases of public law and the privacy case law of torts are not appropriate standards by which to test the constitutional propriety of those investigative devices which are the indispensable instruments of crime control.

The State has the power to subpoena witnesses in criminal trials, although this infringes on their right of privacy. Nor is it necessary for the State to give proof amounting to probable cause that evidence of crime will be obtained from such witnesses and to obtain a court order approving the issuance of the subpoenas. This is not required because the balance of social interests long recognized in our constitutional tradition affirms the overriding importance of the enforcement of the criminal law, and no good reason appears why the species of privacy known as telephonic privacy should be accorded a constitutional rank superior to other forms of privacy.

The argument in support of a preferred status for law enforcement does not proceed in a vacuum. The march of events has enhanced its force and the deepening insights of a more sophisticated age reveal that law enforcement, as regulator of the discordant energies of a mass society, is the vindicator of privacy rather than its enemy.

In a simpler epoch, the crucial importance of law enforcement as a democratic corrective force was unforeseen. In a complex, interdependent, large-scale society where dislocations of the orderly patterns of private life have scintillating social effects and where the power of predatory forces to infiltrate the centers of social and political power and to corrupt the agencies of private endeavor is increasing with every passing day, the enforcement of the conditions of public order and social health becomes a preeminent enterprise of civilization. In such circumstances, the counsels of wisdom suggest a wider range of prerogatives for the minions of criminal justice. In such a time, the unlimited privacy of the frontier is not the appropriate model for a rational social philosophy. The imperatives of an advancing complexity demand that strategic privacies give way to the claims of the regulatory and investigatory state as a condition of the maintenance of that general equilibrium without which all rights of privacy are placed in deadly peril.

C. Even if it be conceded, *arguendo*, that the Due Process Clause of the Fourteenth Amendment protects a right of telephonic privacy, that right is subject to regulation under the police power of the State.

Even if telephone privacy is viewed as "liberty" protected under the Fourteenth Amendment's due process clause, that liberty, as we have seen, is subject to regulation under the police power where such regulation confers benefit on society.

In *West Coast Hotel* v. *Parrish* (300 U.S. 379), Chief Justice Hughes articulated the principle by which may be tested the constitutional propriety of regulation under the police power.

> "The Constitution does not speak of freedom of contract. It speaks of liberty . . . (T)he liberty safeguarded is liberty in a social organization which requires the protection of law in a social organiza-

> tion against the evils which menace the . . . welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

The language in *Parrish* discloses that the "reasonable regulation" rule it recognizes is the standard of legitimacy with respect to governmental invasion of the substantive rights protected in the due process clause. Thus it is applicable to claims of privacy as well as other substantive due process claims.

It might be argued that the *Parrish* rationality test has been superseded, at least where personal rights are at stake, by the compelling subordinating interest[1] test approved in the Opinions of Justice Goldberg and Justice White in *Griswold* v. *Connecticut* (381 U.S. at 497, 504), and in *McLaughlin* v. *Florida* (379 U.S. 184, 196), and *Bates* v. *Little Rock* (361 U.S. 516, 524).

However, these cases involved rights clearly fundamental in nature. The interest in telephone privacy is not of that exalted order. Moreover, this test is really but a restatement of the traditional "too drastic means" principle. It rejects an exercise of the police power which, under the guise of reasonable classification or rational regulation, seeks to justify an encroachment on fundamental rights which could have been avoided without disservice to the governmental objective in question by a less discriminatory classification, or less sweeping application of sovereign power. Clearly, this doctrine, first, propounded in the context of racial discrimination cases, and reaffirmed by only four justices in a case in which there was in issue the most sacred right known to man—marital freedom, was not meant to test the constitutional propriety of ordinary acts of law enforcement having no racial connotations. At most, it would apply only to a regulatory act rather than

the means of its enforcement. It can hardly be invoked to invalidate the traditional forms of penal prohibition.

In any case, it is clear that under this test the wiretapping here in issue and official wiretapping in general are constitutionally unimpeachable, as may be gathered from the ensuing discussion in this brief demonstrating the necessity of both. From this discussion it may indeed be concluded that both are justified by that same doctrine of necessity which permits the invocation of the police power to destroy or seize private property in times of emergency.

That the particular wiretapping here involved was in the interest of the community is obvious. The victim of an extortion plot had been threatened, his daughter had been threatened and his wife had been beaten. It was vitally necessary to learn who had committed the assault on the wife, who had threatened the daughter and whether and when an attempt would be made to inflict physical punishment on the object of the extortion scheme. It was necessary to obtain this information not only to forestall further assaults, but also to bring the perpetrators to justice and to defeat the scheme of extortion. As is shown elsewhere in this brief, there was good reason to believe that such information might be obtained from the wiretaps in question and, indeed, it was so obtained. As a result of the wiretap evidence so procured, the conspirators in this scheme of wrongdoing were brought to justice. In the light of these facts, it is hardly extravagant to conclude that the wiretapping in question was the source of public benefit.

As to the benefits of wiretapping in general, there is impressive scholarly opinion to the effect that wiretapping is an indispensable investigative device. The President's Commission on Law Enforcement and Administration of Justice, at page 7 in its report entitled The Challenge of Crime in a Free Society, declared:

> "... the American system was not designed with Cosa Nostra-type criminal organizations in mind,

and it has been notably unsuccessful to date in preventing such organizations from preying on society . . ."

On page 201 of its report, the Commission stated that solely "in New York have law enforcement officers achieved some level of continuous success in bringing prosecutions against organized crime." The Commission felt that this success was due "primarily to a combination of dedicated and competent personnel and adequate legal tools". At page 95 of its report, the Commission declared that these adequate legal tools consisted of electronic surveillance. At page 203 the Commission recommended the enactment of legislation permitting court-approved official wiretapping.

The law enforcement practice of electronic surveillance under Court authorization has also been approved as necessary and desirable by the Judicial Conference of the United States, House Document No. 194, 90th Cong. 1st Sess. 80 (1967), The National Association of Attorneys General, S. Rep. No. 1097, 90th Cong., 2d Sess. 75 (1968), The National District Attorneys Association, Id. at 76, The National Council on Crime and Delinquency, Ibid., The Association of the Bar of the City of New York, Committees on Federal Legislation and Civil Rights, Report of April 24, 1968.

In its recently released tentative draft entitled "Standards Relating to Electronic Surveillance", the American Bar Association Project on Minimum Standards for Criminal Justice has also taken a position in support of court-authorized wiretapping and electronic surveillance. In the General Commentary appended to the standards, Professor G. Robert Blakey clearly demonstrates that official wiretapping is an indispensable instrument in the war on organized crime, declaring that "the alternative to electronic surveillance has, in short been tried and found wanting . . ." (p. 77).

D. Even assuming, *arguendo*, that the Due Process Clause of the Fourteenth Amendment secured to petitioner a substantive right of telephone privacy and further assuming that the wiretapping in question violated that right, petitioner still can not obtain reversal of the judgment of conviction because the Due Process jurisprudence of this Court does not require exclusion of the wiretap evidence in circumstances such as these.

From the foregoing discussion, it may be seen that petitioner presents no valid due process claim to this Court. But, even if it could be said that petitioner was favored with a "pure" due process right as against official eavesdropping (i.e., a due process right independent of the provisions of the Fourth Amendment), and that it had been violated in this case, that would not justify his prayer for reversal of the judgment herein. The combined legalistic effect of *Wolf, Rochin* and *Irvine* was to establish the proposition (never held applicable in this Court's confession jurisprudence, however), that the exclusionary rule in due process cases is not available as the remedy against pre-trial evidence-gathering offensive to due process unless it involves physical brutality to the body of the accused within the contemplation of the *Rochin* rule. In both *Wolf* and *Irvine,* it had been held that the seizure in issue violated the core of the Fourth Amendment inherent in the due process clause of the Fourteenth Amendment, but that due process did not require that the evidence so obtained be barred from use at the trial. In *Irvine,* this Court refused to sanction the request that it deal with the trial stage in such a way as to control pre-trial violations of due process where there was no deficiency in the truth finding process at the trial. In *Rochin* and *Irvine,* the Court made it clear that this approach would only be discarded in favor of exclusion if the due process violation involved physical brutality to the person such that the sense of justice would be shocked by the use of evidence obtained by such heinous means. *Irvine* declared that an

invasion of privacy by eavesdrop did not constitute an additional category of exception to the general non-exclusionary approach. That approach seems consistent with the Court's "fair trial" jurisprudence in which it refused to set aside State criminal convictions, save in those situations where official wrongdoing had clearly affected the integrity of the trial fact-finding process to the extent of violating minimum standards of justice (e.g., cases involving intentional use of perjured evidence by the prosecutor, such as *Miller* v. *Pate*, 360 U.S. 264 and *Mooney* v. *Hollahan*, 295 U.S. 103).

Mapp v. *Ohio* (367 U.S. 43), overruled *Wolf* and *Irvine* to the extent of holding that evidence obtained by State officers in violation of Fourth Amendment standards must be excluded from a state criminal trial or the state judgment of conviction must be reversed. However, the theoretical basis of Mr. Justice Clark's opinion for the Court was not that the introduction of the illegally seized evidence at the trial was violative of pure due process standards, but rather that the exclusionary rule was an ingredient of the Fourth Amendment. Thus it may be said that there is nothing in the due process clause itself, apart from its Fourth Amendment element, mandating the exclusion at the trial of evidence obtained in the pre-trial stage by methods violative of the due process clause. It is true that a contrary rule was followed by this Court in its State confession cases even before *Miranda* and that, since *Mapp*, the contrary rule has been followed in search and seizure cases. However, the *Rochin* rule was rather recently approved in *Schmerber* v. *California* (384 U.S. 757). It is true that Schmerber, not involving unconstitutional police action, does not expressly articulate the proposition that unconstitutional pre-trial evidence-gathering will not require exclusion at the trial stage on pain of reversal.

But *Schmerber* indicates that the *Rochin-Irvine* rule still provides the standard of exclusion in pure due process

cases, i.e., cases involving due process claims not based on a specific guarantee of the Bill of Rights. The *Rochin* rule, in requiring that evidence be excluded where obtained by physical brutality offensive to the sense of justice, implies that, in the absence of heinous conduct of the type there involved, exclusion shall not be decreed. *Irvine* affirms this implication in explicit terms.

Schmerber also indicates that the wiretapping here involved is not unconstitutional. If the compulsory drawing of blood involved in *Schmerber* is acceptable in the interest of law enforcement, certainly the less drastic practice of silent wiretapping could not be held to exceed the bounds of propriety.

There is nothing shocking to the civilized conscience in court-authorized official wiretapping, as may be gathered from the fact that 27 states permit authorized interception. (See 68 Colum. Law Rev., #2, p. 207.) Certainly the President's Commission on Law Enforcement and Administration of Justice would not have recommended judicially-approved official wiretapping if it offended basic principles of justice.

Indeed, the public interest weighed more strongly in this case, since the crimes here involved are more serious than the drunken driving charge at issue in *Schmerber*. And since this case, unlike *Schmerber*, involves the operations of organized crime, the public interest in law enforcement should be viewed as weightier still. (See G. Robert Blakey, 112 Pa. L. Rev., #4, p. 556.)

Therefore *Schmerber*, by affirming the continued vitality of *Rochin*, seems to reinforce the clear directive of *Irvine* that evidence obtained by pre-trial official eavesdropping will be controlled by the Court's non-exclusionary rule and will not fall within the *Rochin* exception to that rule.

Wolf v. *California* found the core of the Fourth Amendment included in the Fourteenth Amendment's due process clause, but held, in effect, that the exclusionary rule was a mere remedy and not an ingredient of the Fourth Amendment. The exclusionary rule was enforceable in those circumstances, if at all, as a "pure due process" requirement, that is, a requirement of fundamental fairness. But *Wolf* said that exclusion was not required by the fairness rule since that rule ordained only fundamental principles of justice. In the Court's view, the fact that so many states had refused to adopt the exclusionary rule indicated that it was not of fundamental character. The fundamental fairness rule is not applicable to the pre-trial stage of evidence-gathering as such because the Fourth Amendment is a substantive rights provision and the "fairness" concept is a procedural rule which applies to the trial stage. Thus the question in *Wolf* really was whether the introduction of evidence at the criminal trial obtained during the pre-trial stage in violation of the substantive rights enacted in the Fourth Amendment amounted to an infringement of the fundamental fairness concept. *Wolf* said "no", as did *Irvine* v. *California*. *Mapp* did not really give a different answer. *Mapp* simply said that the exclusionary rule *was* an ingredient of the Fourth Amendment, *i.e.*, it was a part of the Fourth Amendment package. *Mapp* did not reject the standpoint inferrable from the *Wolf-Rochin-Irvine* decisional axis that the pure due process fairness rule did not require exclusion at the trial of evidence obtained by pre-trial methods violating substantive rights of due process but not involving physical brutality.

With respect to confessions and cases involving the physical extraction of evidence, a different intellectual technique is implied in the Court's decisions. In the confession cases, and in *Rochin*, where physical evidence was obtained by brutal physical compulsion, the Court did not consider or impliedly recognize the question of whether a

substantive right was involved. It simply decided that it would be shocking to the sense of justice to permit evidence obtained by coercion or brutality to form the basis of conviction.

However, where *testimonial* compulsion was not involved, as in *Breithaupt* v. *Abrams* (352 U.S. 432) and *Schmerber* v. *California,* the extraction of evidence by physical compulsion was not regarded as requiring exclusion at the trial under the fairness rule where the extraction was not accomplished by heinous or brutal official conduct. The confession and physical extraction cases are purely procedural due process cases. The Court's framework of analysis in such cases does not reflect a conception of the problem in dichotomous terms as consisting of a pre-trial stage involving an identifiable substantive right and a trial stage involving a procedural due process claim. The reason this mode of analysis has not gained currency, it is suggested, is because there is no established constitutional right of privacy from which could be deducible a special and narrow variety of privacy with respect to the human body. Thus, the Court's general approach in the pure due process cases relating to criminal procedure would seem to confirm Respondent's argument that the due process clause of the Fourteenth Amendment does not contain a right of telephonic privacy.

Nor is petitioner entitled to invoke this Court's "fair trial" jurisprudence in the circumstances here present. The fair trial principle has been employed to deal with defects in trial procedure rather than illegalities of evidence gathering in the pre-trial stage.

In its elaboration of the "fair trial" standard, this Court has reversed criminal convictions in cases involving intentional use of perjured evidence by the prosecutor (*Miller* v. *Pate,* 360 U.S. 264; *Napue* v. *Illinois,* 360 U.S. 264; *Pyle* v. *Kansas,* 318 U.S. 213; *Mooney* v. *Hollahan,* 294 U.S. 103); failure of the prosecutor to disclose exculpatory evi-

dence (*Giles* v. *Md.*, 386 U.S. 66); presumptions without rational basis which impose a burden of proof upon the accused (*U.S.* v. *Romano*, 383 U.S. 136; *Tot* v. *U.S.*, 319 U.S. 463; *Morrison* v. *Cal.*, 291 U.S. 82); trial before a Judge with an emotional or financial interest in the result of the trial (In re *Murchison*, 349 U.S. 133; *Tumey* v. *Ohio*, 273 U.S. 510). All of these cases involve fundamental defects in the truth-finding process.

Even if petitioner's brief be interpreted as asserting such a due process claim, it is clear that he is not entitled to succeed on this ground, for the evidence contained in the recordings of the wiretaps herein is probative and petitioner has not claimed otherwise. Indeed, a noted authority has declared that wiretapping raises the evidentiary quality of the proof and insures fairer criminal trials (G. Robert Blakey in General Commentary to Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice, pp. 95, 96).

POINT VII

Petitioner may not invoke the Fifth Amendment as the source of a right of telephonic privacy.

Petitioner appears to rely upon the self-incrimination provision of the Fifth Amendment, enforceable through the due process clause of the Fourteenth Amendment, as the source of a right of privacy protective of the interest which he advances before this Court.

The privilege against self-incrimination of the Fifth Amendment is not really a privacy doctrine. The privilege was founded upon the ethic that government should not be permitted to compel the accused to convict himself out of his own mouth under threat of punishment for failure to answer. In its genesis and historic development, it had nothing to do with privacy, although dialectical ingenu-

ity may succeed in finding a privacy value in it by a conceptual analysis which ignores its historic purpose.

Moreover, it is plain that the mere secret interception of petitioner's telephone conversations did not involve testimonial compulsion and thus would not give rise to a right of redress under the privilege against self-incrimination. It is difficult to conceive how the mere interception of petitioner's conversations can be said to have compelled those conversations since petitioner did not even know at the time that they were being intercepted.

This Court would seem to have adopted a similar line of analysis. It held in *Olmstead* v. *United States,* 277 U.S. 438, that wiretapping was not violative of the privilege against self-incrimination because it did not involve testimonial compulsion. This part of the *Olmstead* decision has not been overruled. This Court reaffirmed that standpoint in a context involving secret participant monitoring of a face to face conversation (See *Hoffa* v. *U.S.,* 385 U.S. 293).

Nor can petitioner seek a vindication of his claim by a resort to the underlying values of the Fifth Amendment. This Court has held that the scope of the privilege against self-incrimination does not coincide with the complex of values it helps to protect, and that the privilege has never been given the full scope suggested by such underlying values (*Schmerber* v. *Calif.,* 384 U.S. 757).

If the Fifth Amendment is seen as fully coinciding with its underlying values, then it would follow that an accused may not be compelled to do anything that would assist the development of a criminal case against him such as submitting to a blood test, to fingerprinting, to an identification parade, etc. However, all of these compulsions were viewed by this Court in *Schmerber* as raising no Fifth Amendment question.

If the privilege's animating purpose is seen as the prohibition of all reliance on the accused himself as an evi-

dentiary source regardless of whether compulsion be involved or not (as petitioner's claim implies), then, on that same principle, courts would be required to rule out, as constitutionally illegitimate, on-the-scene identification of criminal perpetrators, shadowing of suspects, and all other investigative techniques whereby something was learned by watching or listening to the defendant or observing something he wrote or produced.

It follows from the foregoing discussion, that petitioner has not sustained his claim that the wiretap interception in question violated his privilege against self-incrimination.

POINT VIII

The wiretapping here in question was not violative of petitioner's First Amendment rights nor does a statute permitting court-authorized official wiretapping offend against the First Amendment.

Petitioner argues that official wiretapping constitutes a restraint on free expression and is thus violative of the First Amendment. However, he does not allege or demonstrate that it operated as such a restraint in this case, so it can hardly be claimed that petitioner's rights were infringed. (Indeed, that petitioner spoke so freely in the conversations here in question, despite the fact that the practice of official wiretapping had been established in New York State since 1938, is a complete refutation of his fanciful theory.) Petitioner's First Amendment argument becomes irrelevant if the Court accepts respondent's contention (in section B of Point II) that its adjudication in this case should not be directed to the validity of the now repealed New York statute under which the wiretap order in this case was obtained, since petitioner's argument in this regard seems to contemplate that freedom of expression would be curtailed by an established course of official eavesdropping, not a single instance.

Petitioner has made undocumented, speculative assertions concerning the effect of official wiretapping on freedom of expression, but he has not provided the Court with any data to support those assertions. Although wiretapping practices have been employed by public officials and private persons all over this country for many years, there is no indication that free trade in ideas has been restricted by them. Only criminals involved in continuing conspiracies are likely to be apprehensive about wiretapping. Other persons are not likely to suspect that they may be subjected to it and thus their telephonic speech would not be inhibited.

As will be shown presently, official wiretapping does not restrain the free exchange of ideas, and even if it did, it would only have that effect with respect to the conversations of criminals since, under the statute here in question, and under the new federal and New York State statutes, official wiretapping is confined to instances where it can be shown that an interception on the telephone line in question would yield evidence of crime. Criminal conversations may be, and universally are, prohibited by the criminal law and thus there would seem to be no constitutional bar to suppressing them indirectly by threat of eavesdropping.

Moreover, if wiretapping is considered objectionable on First Amendment grounds, then it follows that every other type of police surveillance technique must be also constitutionally suspect. Official acceptance of such an analysis would constitute an insuperable obstacle to the enforcement of our laws concerning national security and labor union corruption and would seriously impede the control of criminal conspiracies. Such programs of enforcement are based upon the work of undercover agents, many of whom must attend meetings and public and private convocations at which views are expressed. The principle for which petitioner contends, if carried to the limits of its logic, would seem to forbid all such investigatory activities.

Even if official wiretapping did exercise a restraining effect on the telephonic communications of persons com-

municating criminal intelligence, that would not disqualify it from constitutional acceptance since it is well established that speech which is brigaded with action, or which contains a dimension other than mere expression (See *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284), or which plans or counsels criminal enterprises may be regulated or suppressed.

Even if official wiretapping constituted a restraint on First Amendment freedoms, it would only be an indirect restraint and this Court and others have frequently rejected First Amendment claims in such situations where the claimant sought to frustrate the execution of some valid governmental purpose. (*United States* v. *Rumley*, 345 U.S. 41; *Watkins* v. *United States*, 354 U.S. 178; *Barenblatt* v. *United States*, 360 U.S. 109; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Uphaus* v. *Wyman*, 360 U.S. 72; *Adler* v. *Board of Education*, 342 U.S. 485).

In these indirect restraint situations the Court has dispensed with the clear and present danger test and has employed the *ad hoc* balancing test to sanction governmental action. Indeed, this Court has usually not seen fit to vindicate claims based upon indirect restraint, save in the situation where such restraint operated upon a book seller or a distributor of literature under such circumstances as to pose a serious danger that freedom of the Press would be restricted (e.g., *Smith* v. *California*, 361 U.S. 147). It may be noted in passing that even with respect to direct restraints on First Amendment freedoms, it is well established that the First Amendment does not ordain absolute principles and that the adjudication of a challenge to a regulatory act on First Amendment grounds requires a judicial balancing of interests. (*Breard* v. *Alexandria*, 341 U.S. 622; *Roth* v. *United States*, 354 U.S. 476, 483-485). Much of the commentary on this subject takes the view that the clear and present danger rule, as it has evolved since *Dennis* v. *United States* (341 U.S. 494, 517),

is nothing more than an *ad hoc* balancing test (e.g., see Emerson, 72 Yale L.J. #5, P. 911).

This Court has more than once decreed that First Amendment interests must give way to an overriding public interest. Among the public interests given precedence over free expression by this Court are: the effectiveness of the military recruiting system (*Gilbert* v. *Minnesota*, 254 U.S. 325); the efficiency of war production (*Schaefer* v. *United States*, 251 U.S. 466; *Debs* v. *United States*, 249 U.S. 211; *Abrams* v. *United States*, 250 U.S. 616; *Frohwerk* v. *United States*, 249 U.S. 204); domestic order and tranquillity (*Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Cox* v. *New Hampshire*, 312 U.S. 569; *Whitney* v. *California*, 274 U.S. 357; *Gitlow* v. *New York*, 268 U.S. 652); national security (*Dennis* v. *United States*, 341 U.S. 494); public protection against the threat of violence between religious or political groups (*Beauharnais* v. *Illinois*, 343 U.S. 250; *Feiner* v. *New York*, 340 U.S. 315).

Since the enforcement of the criminal law is the paramount function of local government, it follows that official wiretapping would be constitutionally acceptable under the First Amendment jurisprudence of this Court, even if it did involve an indirect restraint on free expression, which it does not. Nor can petitioner validly claim a right of privacy founded upon the First Amendment. While this Court has pronounced a limited right of First Amendment privacy, that right has been confined to situations involving freedom of association. This Court disclosed the restricted rationale of First Amendment privacy in its decision in *Gibson* v. *Florida Legislative Comm.* (372 U.S. 539), where it quoted from *N.A.A.C.P.* v. *Alabama* (357 U.S. 449, 462) in the following words:

> "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . inviolability of privacy in club association may in many circumstances be in-

dispensable to preservation of freedom of association, particularly where a club espouses dissident beliefs.''

Since this case does not involve such a lawful associative context, there is no ground for invoking the Court's freedom of association doctrine and the narrow rule of privacy which is its derivative. Thus it is clear that petitioner can not rely upon a First Amendment right of privacy. Moreover, this type of interest is not the same as that sought to be invoked by petitioner herein.

Respondent contends that the pertinence of First Amendment theory in the realm of telephonic communications is far from self-evident. The telephone is not the natural setting for the exercise of First Amendment freedoms. Since this instrument did not exist when the First and the Fourteenth Amendments were adopted, it can hardly be said that the Framers intended that First Amendment principles should prohibit governmental action tending to exercise a restraining effect on telephonic expression.

The Framers envisioned the mails, the printing press and the face-to-face discussion as the agencies of expressionary freedom and there would seem no good reason to insist that telephonic communications be favored with the same indulgence in view of the fact that these other avenues of expression are still available. There seems little which cannot be said concerning political, intellectual and sexual subjects in public discourse and the possibility of electronic eavesdropping would hardly be likely to induce a reticence concerning such matters in the present permissive climate of opinion. And even if a regime of wiretapping exercised some restraint on the discussion of intimate, personal matters, such expression is not the type necessary to political and intellectual creativity.

In many telephone conversations, one or the other of the parties, and often both, is in an office or a public place or at least in a situation in which other persons are present. Therefore a wiretap ban would only mean that there would be a few less witnesses—not no witnesses. The official witness conducting the wiretap interception under a statutory regime could not reveal the substance of the conversation unless testimony regarding it should be introduced in Court, whereas the private persons hearing it through physical proximity would hardly be so constrained.

Even assuming that a permisive wiretap program of tapping and public divulgence in legal forums might induce caution and a withholding of the fullest conversational exchanges in telephone talks, it is patent that such caution would only operate to inhibit discussion of illegal acts or embarrassing subjects, e.g., sexual talk. It would not inspire timidity as to legitimate business matters (at least where all but official wiretapping was banned), so economic life would not be restrained.

Can it justly be said that there is really any great need to preserve the fullest freedom of communication with regard to embarrassing subjects? Such matters, too, may be dealt with in personal conference or written missives. There is really no pressing public need to rely on the telephonic medium for such purposes, and what limited advantage in increased communication is conferred by the telephone in this regard seems hardly so weighty a social benefit as would justify significant restrictions on the effectiveness of law enforcement.

On any reasonable application of the *ad hoc* balancing test, this interest in idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement.

That such small talk should not be given the status of protected speech is suggested by this Court's refusal to

extend the protection of the First Amendment to advertising and commercial speech. At the very least it may be said to rank low on the scale of constitutional values.

It is not vital to the well being of the republic that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution.

The impressive technology of telephone communication, which was developed at enormous cost and effort, was not conceived for the purpose of serving as a vehicle for such conversations. The interception of them does not interfere with any activities protected by the justifying rationale of telephonic technology or by basic social values. Most Americans, if questioned on the subject, would surely say that such conversations should be limited to personal confrontations and should not be conducted over the telephone. In any event, interception of such conversations would not embarrass the participants under a court controlled wiretap regime, since they would not be revealed in Court except in those rare instances in which they were enmeshed inextricably with criminal communications.

It is perhaps for this reason that few citizens in New York, if any, have any sensation in their daily lives that their privacy is being invaded, and this is true despite the fact that New York's permissive scheme for wiretapping has long been in effect. Even criminals continue to discuss their illegal enterprises over the phone, as they did in this case. The fact is that the overwhelming majority of telephone conversations are so pedestrian and lacking in interest or color, that the participants would hardly be constrained by fear of eavesdropping.

Not every interpersonal setting qualifies for the full protection of the First Amendment. There are a wide variety of social contexts in which the guarantees of free expression are regarded by the law as inappropriate or applicable only to a limited category of actors in such

contexts, (e.g., parent-child, student-teacher, lecturer-audience, policeman-arrestee, panic-stricken mob in crowded theatre, etc.). In these situations, practical considerations and historical traditions have mitigated against the mechanical application of inapt principles. Consequently there is justification in precedent for the contention that official wiretapping should not be automatically subjected to the full apparatus of First Amendment limitations.

Petitioner's First Amendment objections to wiretapping are based upon fancy, rather than fact. In an exhaustive study on official wiretapping in the American Bar Association's recent tentative draft on Standards Relating to Electronic Surveillance, Professor G. Robert Blakey completely discredits claims such as that advanced by petitioner. In the General Commentary to the American Bar Association draft, Professor Blakey declares:

At page 47—

> "For example, between 1950 and 1959, the Office of the District Attorney of New York County, where electronic surveillance techniques have been vigorously employed, handled 343,745 criminal matters, yet wiretaps were installed in only 219 investigations and only 727 wiretap orders, including renewals, were obtained.[127] This pattern of limited, but vigorous, use has been the same in recent years. After 1958, when court order bugging became possible, the Office "averaged only about seventy-five wiretap orders per year—used only for leads and not court disclosure—and about nineteen bug orders per year."[128] What has been true of the Office of the District Attorney of New York County has also been largely true of the other agencies serving the cities. This data thus must be placed in another context. New York City has about five million phones in a population of eight million people contained in approximately two million households.[129] Court order wiretapping and bugging, it must be concluded, has thus had virtually no impact on the vast majority of citizens."

and at page 88—

> "The statistics noted above on law enforcement use in New York City should lessen the fear that lawful law enforcement surveillance would unduly curtail free speech."
>
> "* * * Finally, there is no substantial evidence today that the personal, intellectual, political, religious, or commercial life of the New York community has measurably suffered because of law enforcement use of these techniques. The fear that authorized electronic surveillance techniques might seriously impair free communication thus appears unfounded. Indeed, members "of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephone tapped, have continued to meet and to make relatively free use of the telephone."

It is, therefore, respectfully submitted that petitioner's First Amendment claim should be disallowed.

POINT IX

Petitioner's contention that the trial prosecutor erred in referring to his inculpatory recorded telephone conversations as confessions is a mere terminological quibble and does not present a meritorious claim of constitutional proportions.

In Point V of his Brief, petitioner assigns as error the trial prosecutor's reference to the wiretapped conversations as confessions. (Presumably it was not this insubstantial question which prompted this Court to grant certiorari). Petitioner seeks to exalt a minor terminological quibble into a constitutional issue. In this endeavor, he should not succeed. The fact is that the statements made by petitioner in these two conversations were damning indications of guilt, as this Court will readily perceive when it examines the record herein. These statements were a confession in practical fact, if not in strict legalistic con-

templation. They would have convinced any observer with doubts that petitioner was guilty as effectively as any confession would. They conclusively showed that he was a criminal participant in the scheme of extortion.

The trial prosecutor said at one point that if Kaiser had said these things to a policeman, it would have amounted to a confession of guilt and the jury must be assumed to have understood from this that the statements were not technically within the legalistic definition of a confession because they were not made to an official. Such an insignificant departure from linguistic perfection hardly diminishes the impressive evidentiary force of these recorded conversations. Thus it cannot be said that, by referring to them as confessions, the prosecutor changed their content or made more of them than their demonstrative quality warranted, and it follows that these fugitive references cannot be said to have prejudiced substantial rights of petitioner.

Furthermore, the prosecutor's remarks were not evidence or binding characterizations and the jury was so instructed. The jury heard the conversations, and, having been instructed by the Judge as to its exclusive power concerning the determination of fact, was in a position to decide whether the conversations in question were inculpatory. In determining that point, it would certainly not have been influenced by nice legalistic questions as to how the conversations should be described in technical legal terminology. Whatever legalistic category the conversations were classifiable under, they either were or were not inculpatory. In fact, they were overwhelmingly inculpatory, and it is hard to imagine how a prosecutor, by describing them in the way any layman would have described them, could have added to the impression which they made upon the jury.

Indeed, there would be no constitutional obstacle to a state procedural rule formally characterizing such incul-

patory statements as admissions or confessions. Such a rule would merely record the counsels of common sense and thus would not be so irrational as to offend the minimum standard of due process. And it is well established that a State may select its own forms of procedure (*Spencer* v. *Texas*, 384 U.S. 554). If a State may accomplish such a result by formal rule, there is no reason why it cannot achieve the same objective informally through the statements of the prosecutor. That the prosecutor's reference may or may not have been technically correct under a prevailing state law definition, is not a matter for a federal constitutional court to pass upon.

In *Spencer* v. *Texas* (384 U.S. 554), this Court refused to strike down a State conviction which was based upon a procedure under which the trial jury was fully informed, through allegations in the indictment and the introduction of proof, of petitioner's previous crimes for the purpose of enhancing punishment in the event of conviction in accordance with the State's multiple offender statute. It is plain that the admission of such proof of other crimes may seriously prejudice defendant, despite limiting instructions, and yet this Court, rightly, it is submitted, did not believe that the disadvantages entailed in this procedure were of constitutional status. If the dangers inherent in the *Texas* procedure did not justify the invocation of this Court's majestic authority, it is plain that the trivial divergence from semantic nicety exhibited in this record can not properly activate its corrective processes.

This Court held in *Spencer* that a state procedure does not run afoul of the Fourteenth Amendment because another method may seem to the Court to be fairer or wiser or to give a surer promise of protection to the prisoner at bar. The Court declared that a state is free to regulate its own criminal procedure and that only those procedures which fall below the minimum level will suffer the sanction of its disapproval. The holding in *Spencer* is but the latest

pronouncement in a well-defined current of authority. (See Cole v. Arkansas, 338 US 476; *Lanzotta* v. *New Jersey*, 305 US 357; *Kay* v. *United States*, 303 US 1).

Does the petitioner seriously argue that the case would be fundamentally different in its constitutional significance if the Assistant District Attorney, instead of using the convenient world "confession", employed some such unwieldly phrase as "statement of facts which, if given to a police officer, would have constituted a confession of guilt", or some other burdensome structure of rhetoric? On any showing, it can scarcely be argued with reason that the difference between these two phraseological modes is so substantial as to require the corrective intervention of the highest court in the land. To argue that a comparative exegesis of these forms of reference discloses substantial gradations of rhetorical significance is to found constitutional rights upon discriminations too subtle for the governance of a system of constitutional redress which takes the brute textures of social fact as the underpinning of decision and the realm of gross events as the theater of its operations. Fundamental law is the ordering instrument of a mundane society, not the vindicator of exquisite niceties. This majestic judicial body does not exist to decide questions of gossamer substance.

Can it seriously be urged that the difference in the alternative strategies of description just discussed is of such import that the awesome powers of our high constitutional court may be invoked to decide between them. The fact is that whichever form of characterization is used is a matter of constitutional indifference. The use of the descriptive term "confession" in these circumstances may be condemned only on the assumption that constitutional review entails the most refined judgments of procedural wisdom.

The due process clause of the Fourteenth Amendment was not designed to enforce upon the States federal in-

tuitions of procedural policy or to fasten upon its processes of criminal justice procedural minutiae which are justifiable in terms of administrative preference rather than fundamental fairness. (See *Hoag* v. *New Jersey*, 356 U. S. 464) A constitutional court will not impose its contravening authority unless the procedure falls below the minimum standard of civilized practice. (See *McNabb* v. *United States*, 318 U.S. 332, 340), on pain of being judged to have invaded those residual powers of State government preserved inviolate against the intrusion of national authority by the very constitutional scheme which sustains the legitimacy of that authority.

The due process clause, enacting a minimum standard, reaches only that official conduct which shocks the civilized sense of justice. (See *Palko* v. *Connecticut*, 302 U.S. 319, 82 L. ed. 288).

It is not the guarantor of procedural prefection, nor does it enthrone luxurious refinements as the determinants of constitutional propriety. (See *Chicago Life Insurance Co.* v. *Cherry*, 244 U.S. 25, 30).

The difference between the description used and the sort of descriptive reference which would presumably satisfy the petitioner's instinct for puristic nuances would not be sufficient to be characterized as one of constitutional dimension.

POINT X

Petitioner's anti-wiretap philosophy is offensive to the canons of empirical inquiry and analytical reason and exhibits the intellectual vice of the partial view.

On Pages 46 through 48 of his Brief, petitioner sets forth a polemical dissertation on the general evils of wiretapping. He argues that "While having in a very real sense increased the freedom of the individual, the telephone has brought

with it a host of new threats to that freedom. Individuals, living in a society which is structured upon face-to-face personal communication, were easily able to make adequate provision for the privacy of such communication. A society which has, however, been structured upon the use of the telephone, has made individual relationships susceptible to the undesired presence of third parties . . . our telephone structured society operates, for the most part, upon the assumption that no one is listening in."

In response, it may be observed that it would not be true to say that persons involved in face-to-face personal communication are "easily able to make adequate provision for the privacy of such communication" in view of the development of advanced eavesdropping devices, long range cameras and other investigative instruments. Non-electronic eavesdropping and physical surveillance of face-to-face personal contacts were always possible and very often effective, even in those earlier stages of social life in which modern electronic detecting devices were unknown.

The trend of petitioner's philosophical critique on wiretapping is toward the conclusion that all compromise of the principle of telephonic secrecy is objectionable. He would preserve inviolate against all competing claims, no matter how weighty, the ideal of telephonic privacy. Petitioner fails to grasp that central principle of the politically organized society which insists that freedom is not an absolute, that it must be distributed in those special patterns which conduce to the benefit of society as a whole. He fails to perceive that no form of liberty may be exercised to the point where it encroaches unacceptably upon the rights and liberties of others or shall be exempt from that reasonably conducted inspection of its exercise by the agents of society, necessary to ensure that it does not offend against the basic interests of society.

The President's Commission on Law Enforcement and the Administration of Justice has found that the telephone

is an indispensable weapon in the arsenal of organized crime. (The Challenge of Crime in a Free Society, p. 201.) *The only effective weapon against such illegal use of the telephone is court-approved official wiretapping.*

If the telephonic medium of expression be totally excused from official surveillance, it follows that the leaders of organized crime may continue to use this indispensable instrument of wrongdoing to invade the privacy and suppress the rights of law-abiding citizens. The approach commended by petitioner would immunize the telephonic medium from all social control and would permit criminal forces to preempt a whole technology for their unimpeded use. One might as well argue that all gun control legislation is philosophically unacceptable as an infringement on the values underlying the Second Amendment.

Petitioner's thesis is radical. It is nothing less than this: that there is an instrument of social life so unique in its character and so superior in its status as to be exempt from those normal processes of social regulation to which all the other acts and agencies of social life are subject. Petitioner seems to contend, by implication, that the function of government is irrelevant to the medium of telephonic communication and that such area of activity marks out a distinct enclave of private sovereignty beyond the reach of government. This is a formula for selective anarchy. Its accepance is totally inconsistent with the fundamental postulate of democratic theory that all private power is subject to the control of the sovereign people so that private energies may be made responsible to those overarching goals sustained by the consent of the governed.

Petitioner also argues that telephonic interception is, by its nature, indiscriminate. As Respondent has indicated in another part of its Brief, the same charge may be brought against the traditional search and seizure, as well as the evidentiary procedure of the Subpoena Duces Tecum.

Moreover, there has never been a single reported instance of which the briefer is aware where it was even alleged that a police officer had employed for an improper purpose or for personal gain information which he learned from wiretapping. Thus the fact that conversations, other than those of a criminal character may also be heard during the course of a wiretap interception does not disqualify this valuable investigative device from acceptance.

Petitioner also raises the dread spectre of official abuse and the possibility of forged or altered tape recordings of telephonic interceptions. He also suggests that the recordation of telephonic interceptions is subject to error owing to the possibility of defects in the recording machine. It may be said in response that all official power is capable of abuse and that there is the possibility of corruption inherent in virtually every mode of governmental action. To deduce the illegitimacy of power from the possibility of its abuse is to condemn all government to impotence. There is virtually no investigative technique which is not susceptible of error (e.g. the fallibility of the eye witness identification is notorious), and an ideal of practice which insists upon certain reliability is not suited to the realm of human affairs. So far as abuse is concerned, the General Commentary to the American Bar Association Draft on Electronic Surveillance indicates that "there had been no documented instances of cases in which tapes had been forged." (p. 93). The Commentary further declares:

> "Some police are, of course, willing to commit perjury, but note that to forge tapes it would require a number of individuals, some of whom would have to be relatively highly skilled technicians. All of those involved in the overhear and subsequent custody of the tapes would have to be ready to undergo cross examination. The likelihood of this abuse occurring is not so great that no use whatsoever of

> tapes should be made. If anything, the increased use of tapes could be expected to raise not lower the quality of evidence in the criminal trial." (page 94)

The Commentary's conclusion in this regard seems well-founded.

Also, it should be noted that forging of tapes is often detectable by expert examination, but petitioner did not, at any stage of this case, seek a hearing to inquire fully into any alleged forgery or make a motion that the tapes in question be subjected to expert analysis. It would appear that petitioner raises this point in an academic spirit and does not offer it as an issue in this case.

It should also be pointed out that the possibility of abuse is perhaps greater with regard to other types of evidence. Witnesses in criminal trials may and do perjure themselves, either out of bias, fear of reprisal or considerations of financial gain.

The wide-spread intimidation and bribing of witnesses which is a staple feature of the organized crime context and the questionable reliability of some accomplice and informer testimony has led some experts to conclude that the use of wiretaps raises the quality of evidence in criminal trials and ensures fairer trials (Standards Relating to Electronics Surveillance, American Bar Association Project, *supra*, pp. 95-96).

Petitioner expresses concern over the possibility of official abuses, such as the re-editing of tape recordings of telephonic interceptions, but every evidentiary device carries with it the possibility of abuse. A policeman who would forge a tape recording might also be willing to perjure himself in the giving of testimonial evidence. This is certainly no argument for barring the testimony of police witnesses. There is inherent in every search and seizure situation the possibility that the searching officers may plant

incriminating evidence upon the searched premises, but this is not a valid reason for outlawing official searches. (Of course, such abuses, like other official abuses, rarely occur.)

Petitioner also poses an alleged danger to First Amendment rights stemming from a pervasive regime of official wiretapping. In the portion of this Brief dealing with the constitutional aspects of the First Amendment issue raised by petitioner, this subject is dealt with in detail. However, it should be pointed out that the fear of pervasive and intensive official electronic surveillance is groundless. In this connection, Professor G. Robert Blakey in the General Commentary to the American Bar Association's Draft on Electronic Surveillance (pp. 45-48) declares:

> "Less widespread publicity has been given, however, to the physical limitations in the existing devices or to the inherent investigative limitations on the use of these techniques."

After discussing these physical and practical limitations on the use of electronic surveillance devices in detail, Professor Blakey declares:

> "Contrary to popular misconception, they are not a 'lazy' way to conduct an investigation.[122] Monitoring surveillance equipment in certain situations requires an inordinate amount of time, hours and hours spent without a word overheard, simply because no one is present and speaking. While automatic recording equipment is available, key devices still require a human monitor.[123] Seldom is it possible for him to be alone. Others have to be available to act immediately on intercepted information. It may be necessary, for example, to place in motion a physical tail or to place a key meeting under physical surveillance, the location of which has just become known. This may require the constant attention of several men and cars to be tied up. All of this takes precious manpower, yet most of the time of the men is spent waiting. Only an important investigation can warrant the use of police personnel, equipment and other

resources in this fashion. Idle curiosity, of course, never will warrant such use. Analysis of the product, too, is painstaking. Voices and overheard names must be identified, and this demands time and talent. Meaning sometimes must be derived from the partial interception of a series of conversations when only one or two take place within the range of the device. Usually, the level of pre-surveillance information is such that the expected information, when it is intercepted, is intelligible, but this, in itself, normally means that extensive investigation must precede the use of these techniques. This, too, limits their use. The notion that the use of these techniques is thus a 'short cut' designed to save 'shoe leather' is mistaken.

Thus, even if there were no legal restraints on the use of these techniques, they could nevertheless be used profitably in only a limited number of investigative situations. For example, between 1950 and 1959, the Office of the District Attorney of New York County, where electronic surveillance techniques have been vigorously employed, handled 343,745 criminal matters, yet wiretaps were installed in only 219 investigations and only 727 wiretap orders, including renewals, were obtained. This pattern of limited, but vigorous, use has been the same in recent years.

* * * *

What seems clear, moreover, is that they offer promise of help to the detective function usually only where multi-party criminal activity extends over a relatively long period of time. Otherwise, there are no communications to intercept. Solitary criminals seldom converse with others about past criminal behavior, and when they do, there is little way to predict beforehand when, how or where. Some geographical separation also is required before recourse to the phone becomes a necessity in running a criminal enterprise. This tends to limit productive tapping to large scale activities, for generally criminals will prefer to meet face to face to hold important conversations. It is practically impossible, moreover, to place isolated meetings under electronic

surveillance. This means that bugging itself tends to be effective only after a pattern of meetings has been established over a period of time. Apart from legal or scientific limitations, in short, the practical limitations tend to restrict the use of electronic surveillance techniques to those situations where they are, in fact, the least objectionable as well as the most needed. From a legitimate law enforcement viewpoint, most criminal investigative situations present circumstances in which normal investigative techniques are both the preferred way and the best practice. Good practice and good law in this area thus tend generally to converge independently of one another."

Petitioner argues that unknown eavesdropping is objectionable because the conversant is unaware of it. However, this Court in *Katz* found such unawareness constitutionally tolerable (See 19 L. ed. 2d 584, n.16).

When one considers the extent to which organized crime has relied upon the telephone in developing highly efficient, coordinated operations, it becomes clear that, in the wrong hands, a telephone may be more damaging than a gun and that its supervision is justified on the same grounds which justify public regulation of other dangerous instruments. It is surely unsound to urge that criminal activities which are subject to control in other circumstances should be clothed with a magical immunity if only they are done in a telephonic context.

In conspiracy and gambling offenses, words are the means of committing the crime. The telephone is often used to utter these words, and only by the use of official wiretapping can such telephonic criminality be brought within the control of the penal law. Wiretapping also provides important evidence in many cases involving blackmail, bribery, official corruption and extortion, since, in such situations, as well, verbal language is often the agency of wrongdoing.

If the telephone is made a privileged sanctuary, then criminals will obtain complete immunity by taking care to commit such crimes only over the telephone.

The view that there is no right to privacy in a *public* place has received the sanction of this Court's acceptance. In 1952, the Court held that the playing of music and radio programs in vehicles of public transit and thereby converting passengers into a captive audience did not violate any right of privacy imbedded in our Constitutional tradition (*Public Utilities Commission of the District of Columbia* v. *Pollak*, 343 U.S. 451). A public telephone line might be considered in some sense a public instrumentality and the standpoint expressed in the *Pollak* case may, by legitimate analogy, serve to illuminate the interests at stake whenever an unlimited right of privacy is claimed as an inherent attribute of free citizenship.

Perhaps we should re-examine our thinking about the telephone system and recognize its aspects as a public instrumentality, with which it bears greater analogy than it does with private contexts. A whole mystique has grown up around that rather mundane instrument—the telephone—investing it with an almost sacred aura. But it is difficult to see why the telephone wire should enjoy a privileged status denied to other instrumentalities of social life—indeed why it should be clothed with greater sanctity than a man's home and hearth. If one's home may be invaded by a lawful search and seizure or the sanctity of the residence disrupted by itinerant religious evangelists (*Martin* v. *Struthers*, 319 U.S. 141) it seems untenable either logically or empirically to argue that telephone wires, which, like the telegraph and transportation systems, are public in character, should remain inviolate.

Moreover, modern organized crime makes effective use of electronic eavesdropping devices and other equipment provided by a sophisticated technology. Law enforcement

must have access to these same devices if it is to conduct the struggle with lawless elements on reasonably commensurate terms.

In this period of expanded federal power, it is important that the states be kept vigorous centers of activity. They can hardly remain so if they are forbidden to exercise their police power with sufficient effectiveness to root out forces which would corrupt the vitality of state government and social institutions.

It is significant that in liberty loving countries like Canada and Great Britain, where the tradition of the inviolability of home and hearth has received its fullest realization, the police are permitted to wiretap. In Great Britain each tap must be authorized in advance by the Home Office. In 1957, a committee of the Privy Council issued a report recommending the continuance of wiretapping as "an effective weapon in law enforcement." The report stated, "The interference with the privacy of the ordinary, law-abiding citizen or with his individual liberty is infinitesimal and only arises as an inevitable incident of intercepting the communications of some wrongdoer. It has produced no harmful consequences."

A significant percentage of the most important criminal convictions in New York State in recent years has been based upon wiretap evidence. Without it, many hardened thugs and dangerous enemies of society would be wandering the streets instead of reposing safely in jail, as they now are.

In this connection, New York County District Attorney Frank Hogan has declared that electronic surveillance ". . . is the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles

"Lucky" Luciano, Jimmy Hines, Louis "Lepke" Buchalter, Jacob "Gurrah" Shapiro, Joseph "Socks" Lanza, George Scalise, Frank Erickson, John "Dio" Dioguardi and Frank Carbo * * *" (The Challenge of Crime In a Free Society, the report of the President's Commission on Law Enforcement and Administration of Justice, page 201).

It should also be noted that electronic surveillance has been an indispensable aid in cases involving our national security.

In the briefer's jurisdiction of Nassau County, wiretapping has enabled law enforcement authorities to learn of planned illegality in advance and to avoid serious crimes of violence that would not have been prevented otherwise.

So far as crime prevention is concerned, it should be realized that when a dangerous habitual criminal is imprisoned through the agency of wiretapping who would otherwise not have been brought to justice, wiretapping has prevented the many crimes he would have committed if at large during those years of imprisonment. Thus even where wiretapping does not prevent the crime with reference to which it was employed, it may still have significant value as a preventive force.

Most of our citizens in jurisdictions permitting official wiretapping and electronic surveillance obviously feel that if such investigative devices save only a few innocent people from being brutally murdered or victimized, it is well worth the limited invasion of telephonic privacy which is thus entailed.

In those situations where the telephone conversations of innocent people are intercepted, they are never publicized, since they are not offered as trial evidence. Indeed, they are never heard except by a few officers, who forget such irrelevant and unhelpful communications as soon as they have listened to them.

On every adjudicative occasion when it must be decided whether to recognize a particular social interest as a legal right, the exact nature of all of the interests involved in the context of decision must be assessed to determine whether, on balance, society would be well served by the grant of jural status to the interest presented for legal recognition.

It must first be noted that telephonic privacy is a low order of privacy, because it is not the sort of privacy needed to nurture creativity or ensure psychic health. Thus even if it were constitutionally protected, it would rank low on the scale of constitutional values, and would weigh less heavily than other privacy values when balanced against the interest of law-abiding citizens in preventing criminals from invading their privacy. Such criminal invasions are often accomplished in such a way as to leave psychic scars and emotional tensions which prevent their victims from making effective use of privacy in the future.

The interest in telephonic privacy as against official eavesdropping of the sort here involved (i.e., wiretapping which is conditioned by a statutory provision, such as that in 813-a, on a showing of reasonable ground to believe that evidence of crime may be obtained from conducting the prospective wiretap) is not an interest shared by every member of society. Under a "reasonable ground" test (and indeed even without it) the factual probabilities are that most members of society will never be subjected to official eavesdropping and that those few law abiding citizens who are subjected to it will never experience such an invasion more than once in a lifetime.

These are the realities of which this Court may take judicial notice (*Brown* v. *Board of Education, supra; Dennis* v. *United States, supra*). That such notice is appropriate may be seen from the discussion in this Point and in Point VIII of this Brief, in which is shown the infrequency of wiretapping in New York County under the regime of

control ordained in 813-a. The practical limitations on electronic surveillance described earlier in this Point also confirm the propriety of such notice.

Thus the interests infringed by such a regime of wiretapping are mostly those of criminals and those associated with them. As against those limited interests, there must be balanced the interests of criminals in being caught and exposed so they may be rehabilitated and achieve self-respect, the interest of our citizenry in preventing criminal corruption and control of our economic, social and political life and criminal infliction of physical injury and property damage which might be avoided by official wiretapping.

When the interests of those who are undeserving by the standards of our social ethos are thus balanced against the interests of law abiding citizens, it is obvious which should receive judicial preferment, even in the absence of the exact empirical data which would permit quantitative rendering of the interests on the opposing scales. This view is corroborated by the realization that invasion of privacy by wiretapping is subtle and painless. Criminal invasion of privacy is harsh and painful.

Of course, it is the part of sophistication to observe that where quantification has done all that can be done to expose the dimensions of the interests at stake, the balancing process is in its nature still qualitative and ineffable. Value judgment is implacably resistant to metricization. It is not performable by a mechanical strategy of quantitative judgment. Thus precise empirical data would not be likely to change the public's obvious view that, whatever the numerical values of the interests confronting each other, the investigative device of wiretapping should be approved. The people of the State of New York, acting in constitutional convention and through their legislators, and the citizens of the United States, acting through the Congress which enacted the Safe Streets Act, have re-

corded their judgment in favor of official wiretapping. There is nothing in the language of the Constitution which signifies the illegitimacy of the balance they have struck or mitigates against the exercise of the power of the people, the source of all governmental power, judicial as well as legislative, to maintain democratic control over the ends of society and the conditions of the common life.

If constitutional adjudication should outlaw wiretapping, the price of this decision may be prohibitive, for what is asked by the advocates of wiretapping is not merely the means for containing minor transgressions, but rather the weapons needed in a mortal struggle with relentless adversaries so vast in their power and so evil in their designs that their continued existence poses a mortal threat to the integrity and stability of democratic government. Can it seriously be maintained that a public interest so urgent and over-riding does not justify the relatively small abridgement of private interests which court-controlled official wiretapping entails? To argue thus is to press the ideal of absolute freedom to a limit so extreme as to jeopardize those foundations of social order without which *all* liberties will be placed in deadly peril.

The insistence on absolute privacy at all costs is the product of an outlook more concerned with conceptual symmetry than concrete facts and practical dangers, the fruits of a methodology which abstracts but one element of a total situation and exalts it to the status of an Article of Faith, whatever mischief may be done in the process.

The philosophy of absolute privacy, like other absolutisms, provides an illusion of certainty in a complex and uncertain world. But it is founded upon a spurious methodology.

The mode of doctrinaire absolutism is really a way of doing without a strategy of policy formation. It amounts

to nothing more than the transaction of complex and dangerous social questions by a method as inflexible, as simplistic and as limited in its adaptability to special circumstances as instinctual behavior. It is respectfully submitted that the Court should not confer upon this retrograde ideology the majestic sanction of its favor.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

WILLIAM CAHN
District Attorney, County of Nassau
State of New York
Attorney for Respondent
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
HENRY P. DE VINE
Assistant District Attorneys
of Counsel

SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

PETER L. F. SABBATINO
233 Broadway
New York, New York 10007
Attorney for Petitioner

HENRY J. BOITEL
Of Counsel

INDEX

	Page
Introductory Comment	1
1. The Standing of the Petitioner to Raise Certain Constitutional Issues in This Court	3
2. The Effect of *Fuller* v. *Alaska*, No. 249, This Term, Upon the Issues Presented in This Case	17
(a) The Petitioner Herein Stands in a Precisely Co-Equal Position With the Petitioner in Lee	8
(b) The Fuller Rationale Was in Part Based Upon the "Good Faith Reliance" of Law Enforcement Officials, But Such Good Faith Reliance Is Demonstrably Absent in the Present Case	9
(c) Fuller Is Distinguishable From the Present Case	10
(d) Even If Section 605 by Itself Does Not Require the Reversal of the Petitioner's Conviction, the Statute Does Not Thereby Completely Lose Its Vitality in This Regard, But Rather Provides Added Strength to the Petitioner's Constitutional Arguments—Arguments Not Present in the Fuller Case	11
(e) The Petitioner's Case Is One of First Impression in This Court	14
3. The Respondent's Absurd Factual View Concerning the Function and Status of Telephonic Communications	15
4. There Is No Merit in Fact or in Law to Respondent's Argument That *Katz* v. *United States*, 389 U. S. 347, Should Be Limited to	

Page

Its Facts and That Fourth Amendment Protections Should Be Circumscribed by a "Contact" Theory 20

5. The Respondent Is Incorrect in Arguing That the Actual Wiretap Procedures Followed Complied With Fourth Amendment Standards 24

(a) The Petitioner Did Not Knowingly Expose His Conversation to Public Hearing 24

(b) The Criteria of the Fourth Amendment Should Not Be Relaxed for the Purpose of Accommodating Wiretapping 25

(c) The Lack of Probable Cause 26

(d) The Lack of Judicial Supervision 28

i. Particularity 28

ii. Duration of Search 29

iii. Return 30

iv. Notice 31

(e) The Quantity of Wiretap Warrants Involved 32

6. The Retroactivity Problem 33

7. The Effect of the Recent Change in Federal and New York State Wiretap Laws 36

8. The Applicability of the Ninth Amendment 37

9. The Respondent's Arguments Concerning "Extreme Judicial Activism" and "Constitutional Crisis" 38

Conclusion 42

Page

Table of Authorities Cited

CASES:

Benanti v. *United States*, 355 U.S. 96 (1957) 9, 13
Berger v. *New York*, 388 U.S. 41 (1967) 5, 6, 7, 12, 36

Camara v. *Municipal Court*, 387 U.S. 523 (1967) 25

Desist v. *United States*, No. 12, This Term 11
Destefano v. *Woods*, —— U.S. ——, 88 S.Ct. 2093 (1968) 35

Fuller v. *Alaska*, —— U.S. ——, No. 249, This Term (1968) 7, 8, 9, 10, 11, 12, 13, 33, 36

Goldman v. *United States*, 316 U.S. 129 (1942) .. 21
Gouled v. *United States*, 255 U.S. 298 (1921) 32

Johnson v. *New Jersey*, 384 U.S. 719 (1966) 34, 35

Katz v. *United States*, 389 U.S. 347 (1967) ..6, 12, 20, 21, 22, 29, 30, 31, 32

Lee v. *Florida*, 392 U.S. 378 (1968) ..7, 8, 9, 11, 12, 13, 25
Linkletter v. *Walker*, 381 U.S. 619 (1965) 12, 13, 34

Manhattan Life Ins. Co. v. *Cohen*, 234 U.S. 123 (1914) 4
Mapp v. *Ohio*, 367 U.S. 643 (1961) 12, 34
Marron v. *United States*, 275 U.S. 192 (1927) 6
Miranda v. *Arizona*, 384 U.S. 436 (1966) 2

Nardone v. *United States*, 302 U.S. 379 (1937) .. 13

Olmstead v. *United States*, 277 U.S. 438 (1928) .. 13, 21
Osborn v. *United States*, 385 U.S. 323 (1966) 28, 31

People v. *McCall*, 17 N. Y. 2d 152 (1966) 29

Raley v. *Ohio*, 360 U.S. 423 (1959) 4
Rochin v. *California*, 347 U.S. 165 (1952) 41

Schmerber v. *California*, 384 U.S. 757 (1966) 32
Stovall v. *Denno*, 388 U.S. 293 (1967) 15, 34, 35

Tehan v. *Shott*, 382 U.S. 406 (1966) 34

Page

Warden v. *Hayden*, 387 U.S. 294 (1967) 32
Weiss v. *United States*, 308 U.S. 321 (1939) 16
Whitney v. *California*, 274 U.S. 357 (1926) 4

UNITED STATES CONSTITUTION:

Article One, Section Eight 14
First Amendment 2, 14, 33
Fourth Amendment 5, 6, 11, 13, 14, 20, 21, 22, 23, 24, 25, 26, 33
Fifth Amendment 2, 14, 32, 33, 34
Sixth Amendment 35
Ninth Amendment 14, 33, 37, 38
Fourteenth Amendment 2, 11, 14, 33

UNITED STATES STATUTES:

Omnibus Crime Control and Safe Streets Act of 1968 13
47 U.S.C. 605 (1934) c. 652, Title VI, §605, 48 Stat. 1103 ..... 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 33, 36

NEW YORK STATE STATUTE:

New York Code of Criminal Procedure, §813-a, *as amended*, L. 1958, c. 676 ..... 5, 9, 36

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Gregory, F.M., in 44 *Notre Dame Lawyer* 171 (1968) 42
Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Congress, First Session, on Bills Relating to Wire-tapping and Eavesdropping 10
Joint Supplemental Reply Brief For Petitioners, *Desist* v. *United States*, No. 12, This Term 10-11
Petition For a Writ of Certiorari, *Fuller* v. *Alaska*, No. 249, This Term 12
Stern & Gressman, *Supreme Court Practice*, 3rd Ed., (1962) 4

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REPLY BRIEF FOR PETITIONER

Introductory Comment

Counsel for the Petitioner regrets the necessity for the submission of a lengthy reply brief. In view of the extensive many-faceted Brief for the Petitioner, the short time allowed for oral argument and the importance of the issues under consideration we are constrained to follow this course.

This introduction will comment briefly upon certain questions not discussed below.

The Respondent's treatment of the facts as to the Petitioner is argumentative and includes mistaken assertions. Since we do not understand the facts which were developed after the installation of the wiretaps to be of decisional importance, we shall not undertake to reply.

Arguments concerning the First, Fifth and Fourteenth Amendments are not developed independently herein. As to the First Amendment, see the Introduction to the Argument in our opening brief, pp. 43-48, and Item 3, *infra,* p. 15. The Fifth Amendment is treated under our argument concerning the lack of notice, pp. 31-32 *infra.* It is of some note that the Respondent finds no Fifth Amendment value involved in wiretapping (Resp. 132-134), but elsewhere urges that for all practical purposes, it was appropriate for the petitioner's wiretapped conversations to be characterized as "confessions" (Resp. 142-146). We believe our arguments generally establish that the wiretapping herein constituted a violation of Fourteenth Amendment Due Process, and so, no separate argument will be made in that regard.

The characterization of the wiretap conversations as being confessions is not met squarely by the Respondent. By summary, he minimizes the language used and the extent of its use. He does not deal with the problem posed by the decision of *Miranda* v. *Arizona* during the course of the trial, nor with the analogy to defendants who have in fact confessed. He persists in characterizing the conversations as being "a confession in practical fact." (Resp. 142). If that is what he thinks, one may easily conclude what the jurors thought upon being presented with that characterization.

We advise the Court that Items 3 and 9, *infra,* involve extensive quotation from Respondent's Brief. Although

such practice is usually discouraged, we have brought the material together under one heading to demonstrate the factual and philosophical approach which the Respondent would have this Court assume.

Applicability of prior decided pivotal decisions upon the issues presented in this case, is discussed under two headings. Item 2 deals with the so-called retroactivity doctrine as it applies to violations of Section 605, and Item 6 deals with that doctrine as it applies to Constitutional questions.

1.

The Standing of the Petitioner to Raise Certain Constitutional Issues in This Court.

The Respondent in his Brief on the Merits urges that the Petitioner is without standing to argue that the warrant herein was not issued upon a showing of probable cause (Resp.[1] 65).

As is conceded by the Respondent, the New York Court of Appeals passed upon the issue of probable cause and declared that probable cause had been shown (Resp. 65). In fact, the opinion of the Court of Appeals dealt with the issue at length (A. 311-312; 21 N.Y. 2d 90, 89-91, 95-96; 286 N.Y.S. 2d 801, 803-803, 808-809).

The Respondent's claim is easily annswered without analysis of the Petitioner's Briefs in the Court of Appeals:

[1] In this Reply Brief, the following abbreviations are used to denote references to documents which are before this Court: "A." denotes the Petitioner's Appendix; "Resp." denotes the Respondent's Brief on the Merits; "Pet." denotes the Petitioner's Brief on the Merits; and "R." denotes the typewritten transcript of the trial.

"Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. *Whitney* v. *California*, 274 U. S. 357, 360-1; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134. 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' *Raley* v. *Ohio*, 360 U. S. 423, 436. Any inquiry into how or when the question was raised in the state courts is then considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised." Stern & Gressman, *Supreme Court Practice*, 3rd Ed., (1962), p. 101.

The Respondent's argument that the Petitioner is without standing to urge that no return was made upon the warrant is likewise without merit. The opinion of the Court of Appeals expressly stated: *"It is true . . . that there was no return on the warrant*—although we presume, since the defendant did not argue otherwise, that a return was made." (A. 313; 21 N.Y.2d 86, 96; 286 N.Y.S. 2d 801, 809) (emphasis added). We submit that this presumption by the Court of Appeals was unwarranted and should not operate to deprive the Petitioner of full review.

It is in this Court, for the first time, that the Respondent claims that a return was in fact made. He claims that it was made to the defense counsel and to the Trial Judge —some two years after the seizures. We discuss this claim *infra*, at pages 5-6.

One must understand the posture of this case when it reached the New York Court of Appeals. This Court had just decided *Berger* v. *New York*, 388 U.S. 41, which declared void on its face Section 813-a of the New York Code of Criminal Procedure, and reversed Berger's conviction on that ground. Our primary thrust, therefore, was to show that the wiretapping aspect of the void statute fell within the *Berger* rationale, and that, in any event, Section 605, independently and combined with *Berger*, required the exclusion of wiretap evidence. Although we argued that the procedures followed herein did not comply with the requirements of the Fourth Amendment, it did not appear appropriate, in light of *Berger*, to make a particular argument as to each of the Fourth Amendment requirements. None of the requirements were called for by the wiretap statute; an examination of the face of the form wiretap orders made it clear that they simply tracked the statute; and the record made it clear that the actual procedures followed certainly did no more than the statute required. We were, therefore, taken by surprise when the Respondent's answering brief in the Court of Appeals argued that the wiretapping was proper since the actual procedures complied with *Berger*. Their brief was served upon us less than 48 hours before oral argument. Upon oral argument, *we asked for and received permission from the Court of Appeals* to file a reply brief responsive to the new issues injected into the case by the Respondent. That reply brief was filed with the Court of Appeals a month before its decision. We argued therein that among the Fourth Amendment requirements lacked by the wiretap orders, they did not provide for a return to be filed specifying the time and circumstances of the removal of the wiretaps together with the tapes and/or recordings of all telephone conversations

obtained by the interceptions, nor did it provide for a return specifying the time and circumstances of the installation of the wiretaps. Realizing that the Court knew that no return was filed and that we challenged the basic Fourth Amendment compliance in the case as well as the Reply aspect of the order, the Court's hairline distinction is not understandable. We urge this Court not to follow the Court of Appeals' presumption, or, in the alternative, to hold that it is a distinction without a difference since the lack of a return requirement in the statute and in the order unconstitutionally placed the making of a return within the complete discretion of the executing officers.

The Respondent additionally argues that the Petitioner's lack of a proprietary interest in the tapped telephone deprived him of standing to challenge the extensive period of time over which the wiretap order was effective (Resp. 71) and the lack of a notice (Resp. 72) provision in the order. This argument is clearly without merit. Applying the law of the case theory, it will be found that the record reveals that the Trial Court held the defendant to have standing to challenge all three telephones from which wiretap evidence was produced at the wiretap hearing, not simply the one upon which the Petitioner spoke (A. 69-70). Directly to the point, however, it was the Petitioner's conversation which was seized, not the telephone, or the telephone wire, or the room. This was the very principle involved in *Katz* v. *United States,* 389 U.S. 347. There is, therefore, no question that he has standing to attack the warrant, and if it is found lacking in the basic requirements of the Fourth Amendment, then it is void and cannot be used to justify the search. *Marron* v. *United States,* 275 U.S. 192, *Berger* v. *New York,* 388 U.S. 41.

A similar proprietary interest argument is advanced in an attempt to prevent the Petitioner from attacking the two month extension provision of the wiretap statute (Resp. 62). As was said in *Berger, supra,* at page 55, the "petitioner clearly has standing to challenge the statute, being indisputably affected by it."

The Respondent further argues that the Petitioner may not attack the telephone taps which did not directly involve the seizure of his conversations (Resp. 79). This, too, is contrary to the holding of the Trial Court in the present case (A. 69-70). Additionally, it is clear that the telephone taps in question were part of a common scheme or plan (Resp. 78-79) and, *infra* 32-33. As to the three taps, the orders for which were revealed to the defense, examination reveals that they were signed by the same judge at the same time (A. 41-44). It cannot be seriously suggested that by using different pieces of paper to authorize the tapping of a number of telephones, a judge can escape the problem of general search implicit in such a plan.

2.

The Effect of Fuller v. Alaska, No. 249, This Term, Upon the Issues Presented in This Case.

This Court's decision of October 28, 1968, in the case of *Fuller* v. *Alaska,* No. 249, this Term, held that the exclusionary rule of *Lee* v. *Florida,* 392 U. S. 378, "is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*"

There can be no doubt that Section 605 of the Federal Communications Act was violated when the Petitioner's

telephone conversations were seized. There can also be no doubt that, absent the ruling in *Fuller*, the Petitioner's conviction would have to be reversed upon the authority of *Lee*. On its face, however, the *Fuller* decision would appear to deprive the Petitioner of his arguments concerning the application of Section 605 to his case. On the contrary, we submit that Section 605, *Fuller* notwithstanding, continues to require the reversal of the Petitioner's conviction. We shall argue below that (a) the Petitioner herein stands in a precisely co-equal position with the Petitioner in *Lee;* (b) the *Fuller* rationale was in part based upon the "good faith reliance" of law enforcement officials, but such good faith reliance is demonstrably absent in the present case; (c) the factual circumstances of *Fuller* are thoroughly distinguishable from the circumstances of the Petitioner's case; (d) even if Section 605 by itself does not require the reversal of the Petitioner's conviction, the statute does not thereby completely lose its vitality in this regard, but rather provides added strength to the Petitioner's Constitutional arguments—arguments not present in the *Fuller* case; and (e) the Petitioner's case is one of first impression in this Court.

(a) The Petitioner Herein Stands in a Precisely Co-Equal Position With the Petitioner in Lee.

The Petition for Certiorari in *Lee* was granted on January 15, 1968. 389 U. S. 1033. This followed the affirmance by the New York Court of Appeals in the present case (December 7, 1967). Certiorari was granted by this Court in the present case on April 22, 1968. Our Petition for Certiorari specifically presented this Court with the question of whether wiretap evidence secured in violation

of Section 605 should have been excluded from evidence in the Petitioner's case and required the reversal of his conviction. (Petition for Certiorari, pp. 4, 23-29.) Both *Lee* and the Petitioner herein were therefore properly before this Court at the same time with the same issue. In contrast, the Petitioner in *Fuller* did not enjoy that status until October 28, 1968, the date upon which his petition was granted and the judgment in his case was affirmed. No meaningful distinction can thus be drawn between the respective positions of the Petitioner herein and *Lee*, and we respectfully submit, no logical reason can be advanced for treating one differently than the other.

(b) The Fuller Rationale Was in Part Based Upon the "Good Faith Reliance" of Law Enforcement Officials, But Such Good Faith Reliance Is Demonstrably Absent in the Present Case.

We submit that the concept of good faith is completely inapplicable to wiretapping performed by New York State officials pursuant to Section 813-a of the New York Code of Criminal Procedure. This Court's opinion in *Benanti* v. *United States*, 355 U. S. 96 (1957), specifically held that wiretapping by New York State officials, pursuant to Section 813-a, was a direct criminal violation of the prohibitions contained in Section 605. Indeed, in his testimony before the United States Senate Committee on the Judiciary, on May 11, 1961, Frank S. Hogan, District Attorney of New York County, said:

> "I am not so hopeful as I should like to be that either of these bills, affecting Federal law enforcement, will pass. My lack of optimism can be attributed, in part,

to the fact that we district attorneys in New York have been patiently but eagerly waiting to hear the voice of Congress assert itself in this area since December 8, 1957.

"On that day, almost 3½ years ago, the Supreme Court of the United States, in the *Benanti* case, declared that section 605 of the Federal Communication Act, making it a crime to intercept telephone conversations and divulge their contents, applied to telephone conversations intercepted by State as well as Federal officials.

"Judges, police officials, and prosecutors in New York, it would appear, have been committing Federal crimes for over 20 years. In our defense, let it be noted that we became lawbreakers under most respectable auspices." Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Congress, First Session, on Bills Relating to Wiretapping and Eavesdropping, May 9-12, 1961, p. 430.

There can therefore be no doubt that the wiretapping herein was done under criminal circumstances, and the wiretappers were fully aware of that fact: good faith can certainly not be postulated upon such conduct.

(c) FULLER IS DISTINGUISHABLE FROM THE PRESENT CASE.

Although telegraphic and telephonic communications were both protected by Section 605, there is a substantial difference between the two means of communication, and there is likewise a difference in the treatment given to them by the statute. *Fuller* involved the seizure of a telegram. As fully developed in the Joint Supplemental Reply

Brief for the Petitioners in *Desist* v. *United States*,[2] No. 12, This Term, pp. 12-15. Section 605 *permits* the seizure of telegrams pursuant to "a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority"; on the other hand, the interception of telephonic communications by any "person not being authorized by the sender" is absolutely prohibited. The statute goes further and provides that in the event of such an illegal seizure, "no person shall divulge or publish the existence, contents, substance," etc. to any other person. *The exclusionary rule is written right into the statute, insofar as telephone communications are concerned.*

For the convenience of the Court and to the degree that the Joint Supplemental Reply Brief in *Desist, supra*, argues that the retroactive doctrine enunciated in *Fuller* should be reconsidered by this Court in a case which more accurately presents to the Court a situation of Section 605 prohibitions, we include by reference herein the argument contained in that Brief at pp. 12-28.

(d) Even If Section 605 by Itself Does Not Require the Reversal of the Petitioner's Conviction, the Statute Does Not Thereby Completely Lose Its Vitality in This Regard, But Rather Provides Added Strength to the Petitioner's Constitutional Arguments—Arguments Not Present in the Fuller Case.

This Court's decision in *Lee* v. *Florida, supra*, did not reach the issues presented under the Fourth and Fourteenth Amendments, 392 U.S. 378, ——, 88 S. Ct. 2096, 2097, footnote 2. *Fuller* manifestly was a "pure" Section 605 case,

[2] A full copy of the Brief in question has been served upon the Respondent herein together with this Reply Brief.

and did not present issues under the Federal Constitution. The sole question raised by *Fuller* in this Court was related only to Section 605 (Petition for a Writ of Certiorari, No. 249, This Term, p. 1.) The Petitioner in this case has consistently urged that Section 605 and the Federal Constitution both independently and in combination require the reversal of his conviction. Point 1-C of the Petitioner's Brief on the Merits at pp. 58-61 specifically argues that:

> "The Federal Communications Act brought telephone conversations within the realm of privacy which is protected by the Federal Fourth and Fifth Amendments, and the search for and seizure of such conversations was unreasonable in a Constitutional sense by virtue of the absolute prohibitions of the Act."

We have argued that a prospective application of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), (Pet. 52, 80), or a limited retroactive application of *Lee*, *supra*, or *Berger* v. *New York*, 388 U.S. 41, or *Katz* v. *United States*, 389 U.S. 347, in light of *Linkletter* v. *Walker*, 381 U.S. 619, require a reversal of the Petitioner's conviction. (Pet. 52-58, 63-67, 80)

We submit that the violation of fundamental constitutional rights—the right to be free from unreasonable searches and the right to be free from testimonial compulsion—are involved in telephone wiretapping (as distinguished from the Fuller telegram situation). Aside from such conversations directly falling within the protections of constitutional provisions, Section 605 brought them within the protection of those provisions. The prohibition of Section 605 being absolute, any violation of that prohibition is *per se* unreasonable. The failure of this court to give retroactive application to a pure statutory right in

Fuller, is clearly not determinative of the question as to whether the same rule will be applied concerning the constitutional violations not present in *Fuller.* Indeed, such a holding would contradict this Court's prior holding in *Linkletter* v. *Walker, supra,* (See Pet. 53-54, 80).

The vitality of the Constitutional aspect of Section 605, was therefore, as to the Petitioner, not dissipated by the *Fuller* case. In fact, this Court's holding in *Lee* would appear to leave no doubt that telephone wiretapping in violation of Section 605 was unreasonable.

It is appropriate at this point to comment upon the Respondent's claim that Section 605 may not limit the warrant provisions of the Fourth Amendment.

The Respondent's Brief at pp. 40-42 argues that:

> "It is a principle of fundamental status that neither 605 nor any other mere statutory enactment can abrogate the Fourth Amendment's permission to invade an otherwise protected area on the authority of a warrant. Such a provision cannot be withdrawn by 605, since a Constitutional provision cannot be amended by statute." (Resp., 41.)

The above argument is clearly erroneous. This Court said as early as *Olmstead* v. *United States,* 277 U. S. 438, 465 (1928), that "Congress may of course (legislate to) protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence • • •" That doctrine was reaffirmed in *Nardone* v. *United States,* 302 U. S. 379, *Benanti* v. *United States,* 355 U. S. 96, and, of course, in *Lee* v. *Florida,* 392 U. S. 378. Likewise, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Chapter 119, specifically provides at Section 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Congressional legislation is not here at war with the Constitution, but rather, in protecting the integrity of the communications system, it is acting pursuant to the Commerce Power granted to it by Article I, Section 8 of the Constitution. Section 605 is not, therefore, a "mere statutory enactment"; it is the implementation of an absolute Congressional power granted by the Constitution itself. The Respondent's argument is grounded upon a fallacious understanding of Congressional power.

(e) The Petitioner's Case Is One of First Impression in This Court.

Finally, insofar as this case provides the opportunity for this Court to rule upon the Constitutional issues involved in wiretapping, it is a case of first impression and for that reason alone requires reversal. If the Court adopts, as applicable to telephone wiretapping, any of the Constitutional Arguments urged by the Petitioner—arguments under the First, Fourth, Fifth, Ninth and Fourteenth Amendments—it will be the Court's first occasion for doing so. This Court has never failed to apply its Constitutional

decisions to the case which brought about the determination. To do otherwise would make appeal on novel Constitutional questions pointless and discourage the vindication of basic Constitutional rights. *Stovall* v. *Denno*, 388 U.S. 293, 301.

3.

The Respondent's Absurd Factual View Concerning the Function and Status of Telephonic Communications.

A determination as to whether telephonic communications falls within the protection of the Federal Constitution must, of course, begin with an evaluation of the function and status of such communication in modern society. The Introduction to our argument in our opening brief offers such an evaluation. Examination of the Respondent's Brief reveals a fundamental and startling conflict on this question. Since the Respondent's approach to the Constitutional questions must be geared to his analysis of the function and status of telephonic communications, we are constrained to gather together from the various parts of the 121 page argument section of his brief his comments in this regard.

Commencing with what we consider a main and desperate hope, he states:

> "Such an appraisal *may also* be reinforced by a change in public values which places less emphasis on the importance of telephonic privacy. That value is not necessarily immutable or as lasting in its vitality, as e.g., marital privacy. The telephone is, after all, not sacrosanct. In some circles, a whole mythology has grown up around this rather mundane little device,

investing it with almost quasi-religious significance, but it is no more a proper subject for canonization than other instruments of social life.

"Under the general intent of our constitutional scheme and the provision of the Tenth Amendment, the power of decision regarding this subject rests with the people acting through their legislative representatives. It is not the design of our constitutional scheme that the Fourth, Ninth or Fourteenth Amendments should be employed to remove such important matters of policy from the domain of popular control." (Resp. 62-63)

This latter appeal for local control over the privacy of communications is absurd in light of the national and international nature of the telephone system. Cf. *Weiss* v. *United States*, 308 U.S. 321.

He goes on to drastically minimize the content of telephone communications:

"Respondent contends that the pertinence of First Amendment theory in the realm of telephonic communications is far from self-evident. The telephone is not the natural setting for the exercise of First Amendment freedoms. Since this instrument did not exist when the First and Fourteenth Amendments were adopted, it can hardly be said that the Framers intended that First Amendment principles should prohibit governmental action tending to exercise a restraining effect on telephonic expression.

"The Framers envisioned the mails, the printing press and the face-to-face discussion as the agencies of expressionary freedom and there would seem no good

reason to insist that telephonic communications be favored with the same indulgence in view of the fact that these other avenues of expression are still available. There seems little which cannot be said concerning political, intellectual and sexual subjects in public discourse and the possibility of electronic eavesdropping would hardly be likely to induce a reticence concerning such matters in the present permissive climate of opinion. And even if a regime of wiretapping exercised some restraint on the discussion of intimate, personal matters, such expression is not the type necessary to political and intellectual creativity.

"In many telephone conversations, one or the other of the parties, and often both, is in an office or a public place or at least in a situation in which other persons are present. Therefore a wiretap ban would only mean that there would be a few less witnesses—not no witnesses. The official witness conducting the wiretap interception under a statutory regime could not reveal the substance of the conversation unless testimony regarding it should be introduced in Court, whereas the private persons hearing it through physical proximity would hardly be so constrained.

"Even assuming that a permissive wiretap program of tapping and public divulgence in legal forums might induce caution and a withholding of the fullest conversational exchanges in telephone talks, it is patent that such caution would only operate to inhibit discussion of illegal acts or embarrassing subjects, e.g., sexual talk. It would not inspire timidity as to legitimate business matters (at least where all but official

wiretapping was banned), so economic life would not be restrained.

"Can it justly be said that there is really any great need to preserve the fullest freedom of communication with regard to embarrassing subjects? Such matters, too, may be dealt with in personal conference or written missives. There is really no pressing public need to rely on the telephonic medium for such purposes, and what limited advantage in increased communication is conferred by the telephone in this regard seems hardly so weighty a social benefit as would justify significant restrictions on the effectiveness of law enforcement.

"On any reasonable application of the *ad hoc* balancing test, this interest in idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement.

"That such small talk should not be given the status of protected speech is suggested by this Court's refusal to extend the protection of the First Amendment to advertising and commercial speech. At the very least it may be said to rank low on the scale of constitutional values.

"It is not vital to the well-being of the republic that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution.

"The impressive technology of telephone communication, which was developed at enormous cost and effort, was not conceived for the purpose of serving as a vehicle for such conversations. The interception of them does not interfere with any activities protected by the justifying rationale of telephonic technology

or by basic social values. Most Americans, if questioned on the subject, would surely say that such conversations should be limited to personal confrontations and should not be conducted over the telephone. In any event, interception of such conversations would not embarrass the participants under a court controlled wiretap regime, since they would not be revealed in Court except in those rare instances in which they were enmeshed inextricably with criminal communications.

"It is perhaps for this reason that few citizens in New York, if any, have any sensation in their daily lives that their privacy is being invaded, and this is true despite the fact that New York's permissive scheme for wiretapping has long been in effect. Even criminals continue to discuss their illegal enterprises over the phone, as they did in this case. The fact is that the overwhelming majority of telephone conversations are so pedestrian and lacking in interest or color, that the participants would hardly be constrained by fear of eavesdropping." Resp. 138-140; see also, Resp. 154, 157.

In light of the diametrically opposite position which the Respondent has offered this Court to rebut the Petitioner's analysis of the function and status of telephone communication, we can do little more than bring the Respondent's view into focus and let it reveal itself for what it is—absurd.

4.

There Is No Merit in Fact or in Law to Respondent's Argument That Katz v. United States, 389 U. S. 347, Should Be Limited to Its Facts and That Fourth Amendment Protections Should Be Circumscribed by a "Contact" Theory.

As we point out under Item 9, *infra,* page 38, the Respondent has engaged in an overabundance of irrelevant, imaginative and absurd speculation concerning the possible results of a determination in the Petitioner's favor. As an introduction to this point, we trust that we will be forgiven some speculation of our own which is more to the point and cuts to the heart of the issue.

Assume that a device is developed which is an extension of presently known photographic and x-ray procedures, so that various types of solid matter can be seen through. Assume further that by manipulation of a fine tune control the powers of the device can be made to penetrate with a high degree of accuracy to whatever depth the operator desires. We thus have a situation where activities behind the walls of a structure can be observed *without contact. But more,* by manipulating the fine tune control the operator will be able to see into the pockets and drawers behind the walls, and will be able, layer by layer, to examine, read and photograph papers and objects contained therein.

In light of present day technology, it is probable that few would contest the likely development of such a device—but whether it be developed or not, it cuts to the heart of the issue concerning the Respondent's "contact" theory of the Fourth Amendment (Resp. 42-56). That theory, in

conjunction with the device described above, would render the Fourth Amendment a nullity. It is inconceivable that this Court would permit such a nullification of purpose.

The explanation of Constitutional doctrine concerning the spoken word being relatively recent, we have used the above illustration to apply electronic developments to the age-old objections of search and seizure. The thrust of the example applies with equal force to the seizure of the spoken word. It is noteworthy that in his fifteen-page advocacy of the "contact" theory, the Respondent offers no rationale for the theory other than that it would permit certain wiretapping.

It would hardly appear necessary to elaborate upon why the Respondent's theory of "contact" is erroneous. This Court has already so held in *Katz* v. *United States*:

> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." 389 U. S. 347, ——, 88 S.Ct. 507, 512.

At one point in his argument, the Respondent argues that wiretapping constitutes neither a physical nor an elec-

tronic invasion. His basis for urging this is that "the conversant cannot place himself inside of a telephone line and . . . a wiretap eavesdrops on that line and not on the place where the talker is located. . . ." (Resp. 50.) This is nothing more than a distortion of reality. Aside from the obvious absurdity of this position, this Court's holding "that the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures" is a clear answer to his contention. *Katz, supra,* 389 U. S. 347, ——, 88 S.Ct. 507, 512.

The Respondent additionally argues that since wiretapping is controlled by statutory law, privacy will not be sacrificed by a holding which excludes wiretapping from the coverage of the Fourth Amendment. (Resp. 56.) In effect, he is urging that the statute has pre-empted a Constitutional area. No citation is needed for the proposition that a statute may not *diminish* rights which are guaranteed by the Constitution.

The "contact" which the Respondent urges is necessary for the invocation of Fourth Amendment protection was in fact present in the instant case.

The Respondent urges that "the Court need go no further than to hold that the *Katz* rule applies only to electronic eavesdropping which involves some physical contact (whether amounting to a trespass or not) with the structure within which is occurring the conversation which is eavesdropped." (Resp. 43.) He concludes his argument by stating that "most wiretapping does not involve such contact, nor was there such contact in this case (A. 117-120, 141, pp. 18-21, Brief for Petitioner)." Since it was the

Respondent District Attorney, himself, who authorized and supervised the wiretapping herein, he knows full well that the wiretap equipment was installed in the basement of a hotel. The bar in which the telephone was located is a part of the hotel structure and shares telephone facilities with it.

That we are dealing with one and the same structure is clearly revealed by the testimony of Detective Beach, who installed the wiretap equipment:

> "Q. Now, as I understand it, Detective Beach, somehow or other you with Detective Skuzenski, you went to the [187] basement of this building wherein was the phone LW 4-2523?
>
> A. Yes, sir.
>
> Q. How did you get into the basement?
>
> A. Through one of the side entrances.
>
> Q. Did the owner of the building know you had come in or had you contacted him?
>
> A. We contacted somebody in the building, sir. I don't know whether he was the owner or what. I believe it was the man behind the desk." (A. 140)

Thus, under the Respondent's own test, wiretapping in this case came within the protection of the Fourth Amendment.

5.

The Respondent Is Incorrect in Arguing That the Actual Wiretap Procedures Followed Complied With Fourth Amendment Standards.

(a) The Petitioner Did Not Knowingly Expose His Conversation to Public Hearing.

The Respondent urges that the telephone conversations herein did not occur in a "situation of privacy". (Resp. 63-64) He urges that since the Petitioner called to a telephone that was located in a public place (the Headline Bar), "it follows that he must have been aware that his telephone calls to the Headline Bar *could have been overheard* on the extension or partially overheard by patrons standing near the telephone." (Resp. 64) He further urges that "moreover, since the objective conditions did not amount to a situation of privacy, it matters not whether Petitioner relied on an assumption of privacy or whether the assumption was reasonable". (Resp. 64) The Respondent builds his case upon assumption after assumption. The question is not "what could have been" but rather what was.

By a logical extension of his argument, very few searches and seizures would be violative of the Fourth Amendment. Thus, the owner of a home or an office or an automobile knows that his guests, patrons, fellow workers or family "could" rummage his drawers, examine his books, pick up his telephone and listen in on an extension, etc. In any event, there is absolutely no record justification for the assertion that the telephone conversations herein did not occur within a situation of privacy. It is noteworthy that

the fact situation in *Lee* v. *Florida* revealed that Lee was a subscriber to a party-line telephone.

The Respondent's arguments concerning the Petitioner's lack of a situation of privacy is interestingly contrasted with his later argument that notice need not be given upon the execution of a wiretap warrant: "(I)t is obvious that notice is but a means of assuring the utter ineffectuality of the wiretap investigative device, since a person who knows his conversation will be overheard is likely to refrain from incriminating statements and warn other persons using his telephone to do likewise." (Resp. 72)

(b) THE CRITERIA OF THE FOURTH AMENDMENT SHOULD NOT BE RELAXED FOR THE PURPOSE OF ACCOMMODATING WIRETAPPING.

In his Brief at pp. 65-73, the Respondent urges that the Fourth Amendment criteria

> "should not be enforced in their full rigor and the Court should be content with the appropriate degree of compliance which may be exacted without destroying the effectiveness of the wiretap investigative device". (Resp. 65)

This is only another way of saying that the Fourth Amendment should bend to accommodate the inherent Fourth Amendment deficiencies which are to be found in many wiretap situations. He cites *Camara* v. *Municipal Court*, 387 U. S. 523, for this proposition, but the case holds nothing of the sort. There, the question discussed at p. 533 concerned the various circumstances under which a war-

rant need or need not be obtained. We know of no case which holds that every time the police come up with a new investigative technique, the Fourth Amendment will be adapted to legitimatize that technique.

(c) The Lack of Probable Cause

As we pointed out in our opening brief (Pet., 67-70), there was no showing of probable cause made to the issuing magistrate. No firm or continuing connection of the alleged co-conspirators was shown as to the telephone in question. There was absolutely no evidence that they spoke with each other over the telephone in question. The only showing made was that Holtzman, the alleged victim, had spoken to Granello through that telephone among other telephones. Had the authorities wanted to overhear Holtzman's conversations, they had only to tap Holtzman's telephone (as they did). If this telephone conversation with Holtzman constituted probable cause, as the Respondent argues (Resp. 73-75), then the issuing magistrate would have been justified (as he may have, in fact, done) in authorizing a wiretap on all the telephones with which Granello, Conte, Graziano and Luttman came in contact, regardless of the nature of the place in which the telephone was located or the number of potential telephone users. Simply listing those *which are mentioned* in Levy's testimony in support of the application and the home telephones of the persons noted, we have (aside from the telephone in question):

1. Charles French Restaurant—Holtzman called Granello there (A. 28), and was scheduled to call him there on another occasion, met him there and was to do so again.

2. Granello's home—Granello instructed Holtzman to call him there and Holtzman did call him there twice (A. 32-33, 35).

3. & 4. Patrissy's Restaurant—Granello instructed Holtzman to call him there (A. 32, 38).

5. Granello's other home in Greenwood Lake—Granello instructed Holtzman to call him there (A. 35).

6. Conte's home—being a part of the conspiracy, his telephone was as likely a source of the conversations sought as any of the other telephones were. (A. 22 et seq.).

7. Graziano's telephone—same rationale as Conte. (A. 36-37).

8. Luttman's telephone—same rationale as Conte.

If they had placed the above four persons under surveillance and noted where they sometimes made telephone calls, these places too could have been added to the list with no less justification than that which existed for the telephones noted.

It is not enough to show that certain persons are engaged in a criminal enterprise; there must be probable cause to believe that the search will uncover evidence of the alleged crime. That was not here the case.

(d) The Lack of Judicial Supervision

i. *Particularity*

The wiretap order herein was completely devoid of particularity. It ordered that all telephone conversations be intercepted and noted simply "that evidence of crime may be obtained", without specifying the crime concerning which evidence was being sought. (A. 41-42) If such a warrant accords with the requirement of particularity, what type of warrant would not accord with that requirement? What guidance did the warrant give to the implementing police officers other than the telephone number to be tapped? It might as well have said "Go to such and such an apartment building and bring back the contents of every apartment."

It is noteworthy that the Respondent concedes that "by the very nature of the wiretapping process, it may be impossible for a warrant authorizing it to comply fully with each Fourth Amendment warrant criterion, especially that concerning particularity". (Resp. 66) Likewise, "the fact is that a wiretap interception picks up all conversations during the period in which it is conducted regardless of the degree of descriptive particularity in the wiretap order." (Resp. 70) Using his bootstrap reasoning, he concludes:

> "Thus, an insistence on strict particularity in the description of the conversants within the scope of the order would serve no useful, practical purpose. The argument that wiretap eavesdropping must restrict itself to the overhearing of particular conversations is simply another way of urging the untenable thesis that wiretapping is unconstitutional in its very nature and must be suppressed." (Resp. 70)

We submit that if, as *the Respondent* urges, a wiretap order cannot particularize the objective of the search, or if the wiretappers cannot so restrict the search, then wiretapping is indeed unconstitutional. But see *Osborn* v. *United States,* 385 U. S. 323, and *Katz* v. *United States,* 389 U. S. 347, ——, 88 S.Ct. 507, 513, in which this Court found such particularity possible.

In attempting to shore up his argument of particularity, the Respondent argues that "the description provided in this case in the order was supplemented by the oral testimony before the issuing judge of Assistant District Attorney Norman Levy. Under the law of New York, such oral testimony forms part of the wiretap order (*People* v. *McCall,* 17 N. Y. 2d 152), as the Court of Appeals noted in this case." Mr. Levy's testimony takes up 34 typewritten and 21 printed pages (A. 20-40). There has never been any allegation in this case that the wiretappers were armed with copies of this oral testimony, and it is clear that they were not present when this testimony was given (A. 83). How that testimony could have placed any restriction upon the wiretappers is beyond understanding. Had the testimony never been given, and had the order simply been granted upon mere request, the wiretappers would have seized precisely the same conversations which were transmitted over the telephone in question during the period of the surveillance.

ii. *Duration of Search*

The search was authorized for a period of sixty days, with no automatic termination provision and there was statutory authorization for a renewal of an additional sixty days. The Respondent argues that, notwithstanding, the

provisions of the order, the fact is that the conversations which were used in evidence were seized after a period of less than four days of wiretapping. (Resp. 76) Even if an order providing for a four day surveillance would be adequate (which we do not concede), the fact is that the order herein did not so provide. The Respondent has provided no answer consistent with this Court's holding in *Katz* v. *United States* that "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer." 88 S.Ct. 507, 514. Without citation or elaboration, the Respondent states:

> "Also, it is Respondent's contention that *the overheard conversations were not seized when they were overheard but only, if at all, when they were used in Court.* (Resp. 72—emphasis in original.)

This preposterous assertion is devoid of any logic whatever.

iii. *Return*

In arguing that a return *was,* in fact, made, the Respondent follows, word for word, the allegations of his Brief in Opposition to our Petition for Certiorari. His claim is that a return was made to the "petitioner and the trial judge" some two years after the seizures. (Resp. 77-78). In our opening brief, we challenged the validity of the claim that this constituted a proper return (Pet. 77-78). He has made no attempt to respond to that challenge and offers no authority for his novel assertion. He claims that the so-called method of return followed in the present case did not prejudice the Petitioner (Resp. 78). Who is to say

that? Who knows what might have happened to those tapes during the two year period involved? To this day, no one aside from the wiretappers, has had possession or knowledge of all the tapes of seized conversations. To this day, we have no way of knowing whether conversations, other than those used in evidence, could have been used by the defense for purposes of exculpation. The District Attorney used what he thought to be valuable and stored the rest away. Even aside from the factor of actual prejudice, the requirement of real control over the search and seizure process was completely frustrated by this lack of a return. The statute did not provide for a return, the order did not provide for a return and the Court of Appeals of New York has held that "It is true . . . that there was not return on the warrant • • • " (A. 313; 21 N.Y.2d 86, 96; 286 N.Y.S. 2d 801, 809).

iv. *Notice*

The present position of this Court on the question of notice in electronic surveillance cases is concededly unclear. The one such case in which the surveillance was upheld although there was no notice was *Osborn* v. *United States,* 385 U.S. 323. But the situation there was substantially different from that in the wiretapping area. An informer was invited in and he recorded his own conversation with the defendant. The defendant there was on notice that he was speaking to the informer, although not on notice that the conversation was being recorded. Mr. Justice Stewart, in a footnote to this opinion in *Katz* v. *United States,* explains this lack of notice upon the theory, "that officers need not announce their purpose before conducting an otherwise authorized search if such announcement would provoke the

escape of the suspect or the destruction of the critical evidence." 389 U.S. 347, ——, 88 S.Ct. 507, 513, footnote 16. This analysis is somewhat questionable. In the first place, we are not concerned here with an escape situation. As for the second ground, the destruction of evidence, a knotty problem is presented. In our opening brief, at page 61, we noted that "outside the area of eavesdropping, we know of no case which authorized the seizure of something which has not yet come into existence." The Respondent has left unanswered this criticism of wiretapping. Applying Mr. Justice Stewart's rationale to the above comment, there is produced the explanation that the lack of notice is warranted by the desire to prevent the destruction of the critical evidence which has not yet come into existence. This leaves us with a situation twice removed from traditional search and seizure requirements. Have we come that far away from the mere evidence rule? Cf. *Gouled* v. *United States,* 255 U.S. 298, 309, *Warden* v. *Hayden,* 387 U.S. 294.

We submit that the notice requirement is at least one of the areas in which "the fourth and fifth amendments run into each other" when applied to wiretapping. The argument in our main brief that wiretapping violates the Fifth Amendment is applicable here (Pet. 62-63). The statements of this Court in *Schmerber* v. *California,* 384 U.S. 757, 763-764, and *Warden* v. *Hayden,* 387 U.S. 294, 302-303, lend strong support to this theory.

(e) The Quantity of Wiretap Warrants Involved

It is known that at least four separate telephones were tapped in the present case. By a motion filed with this Court on October 7, 1968, we requested that an order issue requiring the Respondent to inform this Court concerning

the number and nature of the electronic surveillance attempts in the present case. We had earlier announced our intention to make this motion in our opening Brief (Pet. 18, 78). As this reply brief is being sent to the printer, no answering papers on the motion have been received from the Respondent and no disposition has been made of the motion by the Court. The Respondent's Brief was served upon us on October 25, 1968, at least 17 days after they received our motion papers, yet he ignores the thrust and content of those papers. He refers only to our announced intention, made in our opening brief, to make such a motion, and our challenge to the four known wiretaps, which forms Point III-D of our opening brief (Pet. 76-79). Our argument, that the broad grant of wiretapping permission in the present case, covering a number of telephones, compounded the unconstitutionality of the search so as to decisively deprive the wiretapping of any semblance of due process, is met only by the answer that the Petitioner has no standing to challenge those "orders on telephones in which he has no proprietary interest and over which he has not conversed." (Resp. 79). That claim is met by us under item 1 *supra* at page 6.

6.

The Retroactivity Problem.

In our discussion under item 2, *supra*, pages 7-15, we discuss the question of retroactivity as it applies to the Section 605 aspect of our case, particularly with reference to the impact of *Fuller* v. *Alaska*, No. 249, This Term. Here we discuss retroactivity as it applies concerning our arguments under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

Assuming a new rule is announced in the present case, favorable to the Petitioner's arguments, he "must be given (the) benefit" of that rule. *Stovall* v. *Denno*, 388 U.S. 293, 301.

Assuming that a decision is rendered, favorable to the Petitioner's arguments under *Mapp* v. *Ohio*, 367 U.S. 643, then *Linkletter* v. *Walker*, 381 U.S. 618, dictates a reversal since the Petitioner's case is still in the appellate process, or, perhaps more to the point, since this case simply involves a completely prospective application of *Mapp*.

Assuming that a decision is rendered, favorable to the Petitioner's arguments, but neither novel nor under *Mapp*, but rather, pursuant to some prior decision which creates a retroactivity question, then we still maintain that this Court's retroactivity jurisprudence requires a reversal. In attempting to perceive the rationale of this Court's various decisions on retroactivity, we have concluded that it is to leave open, at least to defendant's on direct appeal, an attack upon the actual oppression which the Constitution seeks to prevent. Thus, *Linkletter* v. *Walker*, *supra*, permitted such persons to attack an illicit search and seizure—the fact of prejudice was clear and one could not get any more basic than to show that the search and seizure was unconstitutional; *Tehan* v. *Shott*, 382 U.S. 406, 409, footnote 3, permitted such persons to attack the Fifth Amendment violation occasioned by comment upon the accused's failure to testify—the fact of prejudice was clear and one could not get any more basic than to show that the comment was unconstitutional. On the other hand, *Johnson* v. *New Jersey*, 384 U.S. 719, which set the timetable for the new confession rules, was concerned not with fundamental rules, but rather intermediate rules. What we mean is

that the *basic* Constitutional question involved was that of coerced confessions. The new rules were geared toward minimizing the incidence of coerced confessions. *Johnson* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually coerced confession. 384 U.S. 719, 730. Indeed, lack of compliance with the new rules was left available for use as one of the elements of an involuntariness claim. *Ibid. Stovall* v. *Denno,* 388 U.S. 293, which set the timetable for the new lineup rules, presented basically the same situation as *Johnson, supra. Stovall,* too, was concerned not with the vindication of fundamental Constitutional rules, but rather, with the implementation of intermediate rules which were geared toward minimizing the incidence of unfair lineup procedures. *Stovall* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually unfair lineup. 388 U.S. 293, 301-302.

The above decisions were all basically concerned with questions of evidence. This Court's determination in *Destefano* v. *Woods,* —— U.S. ——, 88 S.Ct. 2093 involved a qualitatively different problem, the applicability of the Sixth Amendment right to a jury trial. The underlying objective appeared to be that of guaranteeing a fair trial and, as the Court said "to prevent arbitrariness and repression." —— U.S. ——, ——, 88 S.Ct. 2093, 2095. It goes without saying that the alternative approaches provided by *Johnson* and *Stovall, supra,* are available to those who do not qualify under the *Destefano* doctrine. Moreover, in the type of cases to which the jury trial rule would apply,

were it not for the decisional deadline, stenographic minutes of the proceedings are available and the defendant will have had the assistance of counsel in making a proper record—all of this being available for an attack upon actual unfairness.

7.

The Effect of the Recent Change in Federal and New York State Wiretap Laws.

The Respondent argues that the recent change in the Federal wiretap law renders the prohibitions of Section 605 "inoperative" for the future. (Resp. 79-80). We assume that this Court's recent decision in *Fuller* v. *Alaska,* No. 249, This Term, which applies Section 605 to cases yet to be tried, eliminates that argument. Our position, to the effect that Section 605 should still be operative in the Petitioner's case, even in light of *Fuller,* is covered under Item 2, *supra,* pages 7-15.

The Respondent further urges that this Court need not concern itself with Section 813-a of the New York Code of Criminal Procedure—the statute declared unconstitutional on its face in *Berger* v. *New York,* 388 U.S. 41, 44, 55, 64. The fact is that the conversations were seized pursuant to that statute, the New York Court of Appeals examined the seizures pursuant to that statute, and, although now repealed, the statute is very much alive as far as this Petitioner is concerned. It would indeed be a strange sort of due process which would permit the rules to be changed after they had been broken, thus depriving a defendant of the right to challenge the grossly improper procedure to which he has been subjected.

8.

The Applicability of the Ninth Amendment.

The Respondent argues that if our Ninth Amendment argument is accepted, it will bring all wiretap legislation crashing down. As we stated in our opening brief, if the People of our Country want wiretapping, the process of Constitutional amendment is available to them. The incredibly crass intrusion involved in wiretapping would very likely have been considered somewhat beneath barbarism in an earlier age. Can it be doubted that wiretapping intrudes upon the lives of far more good, innocent people than it does upon the lives of criminals? This is not to suggest that the one has any greater rights than the other, but it is certainly a fact of extreme significance as to the propriety of the means employed. We submit that the privacy involved here is an aspect of the freedom which the People reserved to themselves, and only they should give it up—neither legislature nor court should take it away.

The Respondent urges that this Court has avoided such absolute prohibitions (Resp. 93). Of course, it is a matter of perspective. This Court *has* given effect to the Constitutional mandate that coerced confessions are absolutely prohibited, that unreasonable searches and seizures, unfair trials, etc., are likewise prohibited.

9.

The Respondent's Arguments Concerning "Extreme Judicial Activism" and "Constitutional Crisis".

In light of the implications to be found in certain of the Respondent's arguments and which appear to reflect the philosophy of his brief, we are constrained to deal with those arguments.

At page 93 of Respondent's Brief, it is urged that this Court should not rely upon the Ninth Amendment as being a source for the protection of individual privacy. He states that such a determination:

> "... will unleash upon this Court unrelenting pressure to undertake a new career of extreme judicial activism in the service of a totally novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy."

At page 94, he claims:

> "That such an enhanced role for the judiciary would incite a constitutional crisis as pervasive as that of the 1930's, is perhaps not an unreasonable expectation."

Whether this latter comment be a veiled (or, perhaps, not so veiled) attempt to intimidate this Court, we leave for the Respondent to explain.

The initial question before this Court is whether those aspects of the Constitution which protect the integrity and dignity of the individual and of society apply to the telephonic medium of communication. If they do apply, then

the question is under what circumstances, if at all, may wiretapping be performed. The spectre of what "may", "might", "could" or "possibly will" be the result of such a decision is raised by the Respondent through the use of absurd analogies and projections. The Respondent's brief is replete with imaginative straw men against which he does battle, rather than meet directly the arguments advanced by the Petitioner.

The Respondent urges this Court that the Constitutional imposition of restrictions upon wiretapping:

> "*might* be considered" to eliminate the use in evidence of observations open to public view (Resp. 45); "*may* exercise a constraining effect on the activities of law enforcement officers mindful of the possibility" of civil or criminal liability (Resp. 47); "*may* lead to widespread cynicism in the police establishment concerning the obligation to respect this Court's decisions" (Resp. 47); "*may* encourage a massive outpouring of damage suits and injunctions" (Resp. 47-48); "*may, if* interpreted broadly, prohibit informer evidence obtained by stealth and without cooperation of the suspect" (Resp. 49); "would deal a fatal blow to law enforcement" (Resp. 47); "*could* be used to protect . . . persons conversing briefly in secluded corners in public places or restaurants in low tones audible to electronic surveillance or to an eavesdropper hidden behind a post or curtain" (Resp. 51); "would (result in) extensive pre-trial motions and hearings" (Resp. 52); "*might* result in a breakdown of law enforcement" (Resp. 52); "would only compound" calendar congestion and serious delays in the trial of felony cases and

increase the plight of those financially unable to make bail" (Resp. 52); "lower courts, state and federal, *might* by a bold course of inference, deduce the conceptual consequences of the Court's full-blown statement as protecting . . . any other expression or emanation of (the accused's) personality or person which he intended to be private" (Resp. 53); "*might* impel some state and federal courts to declare e. g. that written evidence of the fruits of crime buried in a forest or secreted on someone else's property could not be obtained by police without a warrant" (Resp. 54); "*might* well result in the abrogation of the traditional principle that the Fourth Amendment regulates only official conduct" (Resp. 54); "Nor may it be assumed with confidence that Courts will not decree such a regime of unreason" (Resp. 55); "the goal which (this Court) regards as marking the limits of the possible *may* simply provide the point of departure for a successor Court, so that by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement" (Resp. 55).

Additionally, such a decision

"*may* produce a fundamental alteration in the balance of social forces . . . (and) a permanently flawed society" (Resp. 56); "would call into question all of the other privacy invading investigative devices employed by law enforcement officers" (Resp. 93); "will be the means of working a fundamental change in the federalist structure of authority ordained by the Framers" (Resp. 97); "*might* be interpreted as saying that all

evidence obtained by non-physical invasion of a situation of privacy must be excluded from evidence in State criminal trials" (Resp. 102); "would authorize the protection of an endless range of interests as varied as those multitudinous occasions of dignity—the infringement of which are the everyday result of government's operation" (Resp. 106); "it follows that every type of privacy invading technique indulged in by the police is violative of a right of privacy" (Resp. 113); "ignore(s) the privacy of those victims of crime which can only be protected by official wiretappings" (Resp. 116); "would constitute an insuperable obstacle to the enforcement of our laws concerning national security and labor union corruption and would seriously impede the control of criminal conspiracies" (R. 135); and "would serve to forbid" "work of undercover agents" (R. 135). (Emphasis added.)

This parade of horribles is drawn from a view of our judicial system as being composed of "extreme judicial activist(s)" (Resp. 93), embarked upon a "regime of unreason" (Resp. 55). In light of the outlandish hypotheticals conjured up by the Respondent, it is, perhaps, with tongue in cheek that he quotes Mr. Justice Frankfurter's comment in *Rochin* v. *California*, 347 U.S. 165, at 174, at page 44 of his brief:

"We are not unmindful that hypothetical situations can be conjured shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is intended to preserve practical and substantial rights, not to maintain theories."

To cast the issue in activist and anti-activist terms, is simply to avoid the issue. We submit that often " . . . the self-proclaimed anti-activist goes through much the same process of choice and decision as does the activist, but simply reaches a different result." F. M. Gregory, Jr., in a book review, 44 Notre Dame Lawyer 171 (1968). As Mr. Justice Black has noted, such terminology "has served as a substitute for careful thinking and writing and also as a fallacious short cut to unjustified conclusions . . . " H. L. Black, *A Constitutional Faith*, p. 15 (1968).

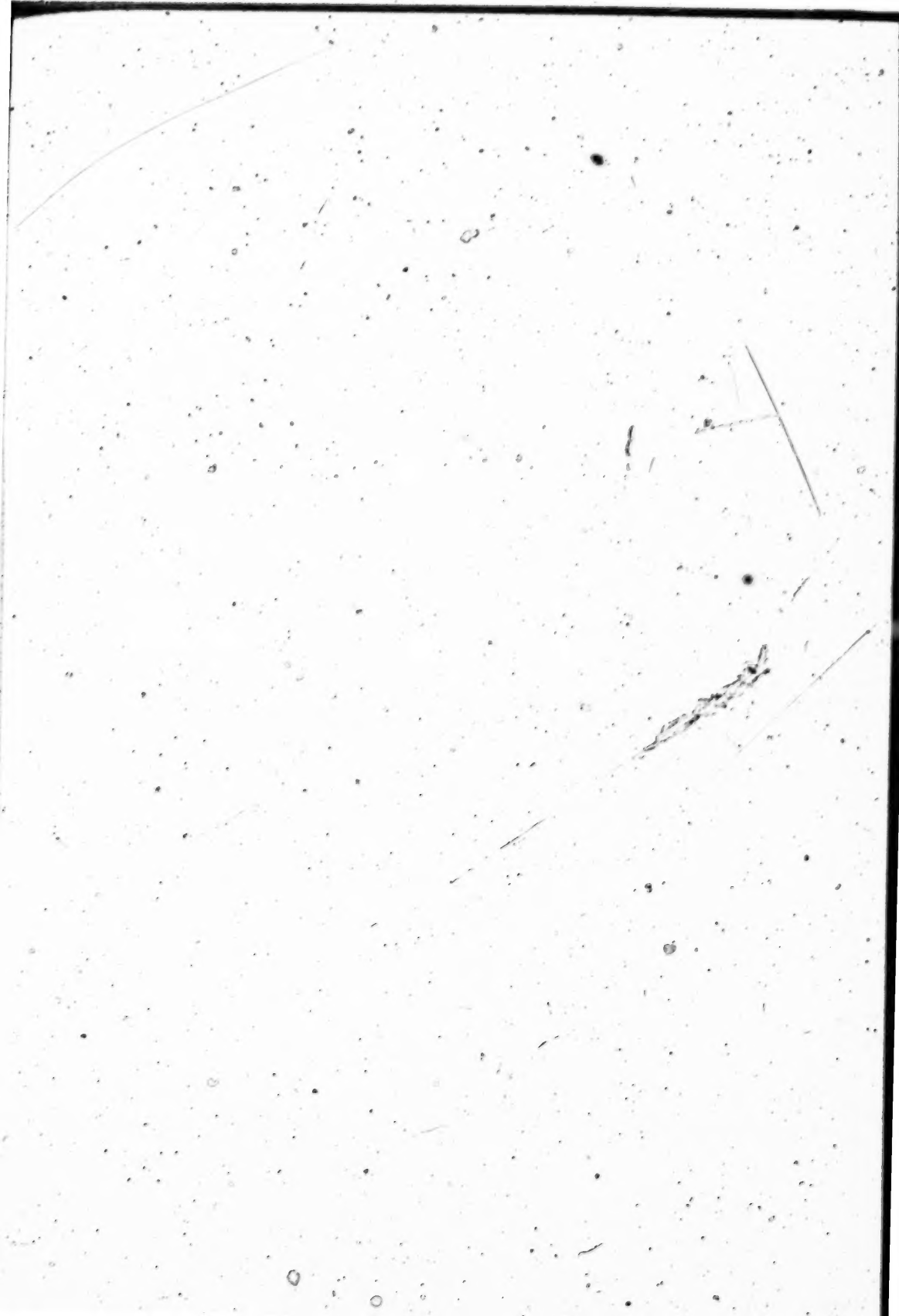
Conclusion

For all of the above reasons, as well as those advanced in our opening brief, the judgment of the Court below should be reversed and the prosecution against the Petitioner, Thomas R. Kaiser should be ordered dismissed.

Respectfully submitted,

PETER L. F. SABBATINO
Attorney for the Petitioner,
Thomas R. Kaiser

HENRY J. BOITEL
Of Counsel



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IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S REPLY TO PETITIONER'S REPLY BRIEF

WILLIAM CAHN,
District Attorney, County of Nassau.

GEORGE DANZIG LEVINE,
Assistant District Attorney,
of Counsel.

TABLE OF CONTENTS

	PAGE
Introduction	1
A. Petitioner's Comments on the Fifth Amendment Question in His Reply Brief Are Lacking in Merit	2
B. Petitioner's "Standing" Argument in His Reply Brief Is Not Well Taken	4
C. Petitioner's Argument in His Reply Brief Concerning Retroactivity Should Not Be Accepted by This Court	6
D. There Is No Merit in Petitioner's Contention that Section 605 Broadened the Enclave of Privacy Guaranteed in the Fourth Amendment so as to Include Telephone Conversations within the Scope of Its Safeguards while, at the Same Time, Excluding Telephone Conversations from the Permissive Warrant Provisions which, by the Clear Terms of the Fourth Amendment, Are Applicable to All Classes of Evidence Gathering Activities within Its Regulatory Ambit	12
E. Petitioner's Comments Concerning Respondent's Argument Against National Judicial Control of Local Telephonic Communication Is Ill-Founded	14
F. Petitioner's Arguments in Opposition to Respondent's Contention that Fourth Amendment Protections Should Be Circumscribed by a Contact Theory Are Lacking in Force	14
G. Petitioner's Reply Brief Does Not Effectively Deal with Respondent's Contention that the Telephone Conversations in Question Did Not Occur in a Situation of Privacy	17

PAGE

H. Petitioner's Objections to Respondent's Argument that the Wiretap Order Herein and Its Execution Were Not Violative of Fourth Amendment Standards Is of Questionable Force 18

I. Respondent's Imaginative Rehearsal of the Possible Consequences of a Decision in Favor of Petitioner Was Well Within the Limits of Sound Constitutional Advocacy and Petitioner's Objection to This Methodology of Argumentation Proceeds from an Imperfect Understanding of the Demands of Judicial Statesmanship or the Nature of Judicial Policy Making.. 21

CONCLUSION 22

Table of Cases Cited

Doremus v. Board of Education, 342 U.S. 429..... 5

Johnson v. New Jersey, 384 U.S. 719 11

Jones v. United States, 362 U.S. 257 6

Lanza v. New York, 370 U.S. 139, 143 17

Mancusi v. De Forte, 20 L. Ed. 2d 1154 ..... 6, 18

Noble State Bank v. Haskell, 219 U.S. 104 22

Stovall v. Denno, 388 U.S. 293, 297 10

Cf. Weiss v. United States, 308 U.S. 321 14

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Introduction

In his Reply Brief, Petitioner continuously employs an extraordinary new intellectual method which may be deemed advocacy by epithet. He adverts to a particular portion of Respondent's Brief and then characterizes it with the epithet "absurd" or some equally discourteous description. The only absurdity in this case is Petitioner's repetitious invocation of the word "absurd" and analogous incivilities. Petitioner employs the word "absurd" and similar characterizations at least eight times (on pages 16, 19, 20, 22, 28, 30, 39 and 41) without once successfully demonstrating that the formulations to which he is directing his strictures are either absurd, or, indeed, lacking in merit. As is so often the case when epithets are made to do service for analysis, both Petitioner's Brief and his

Reply Brief exhibit serious deficiencies. Presumably, the tactic of invective was invoked in Petitioner's Brief in order to divert attention from the significant inadequacies of conception which are displayed in Petitioner's submissions to this Court.

A. Petitioner's Comments on the Fifth Amendment Question in His Reply Brief Are Lacking in Merit.

On page 2 of his Reply Brief, Petitioner declares that it "is of some note that the Respondent finds no Fifth Amendment value involved in wiretapping. . . . , but elsewhere urges that for all practical purposes, it was appropriate for the Petitioner's wiretapped conversations to be characterized as 'confessions'."

It is not clear why the Petitioner thinks that these described standpoints of Respondent are "of some note". Respondent's view that this case presents no violation of the privilege against self-incrimination was based upon the fact that the secret interception of a telephone conversation can hardly be viewed as compelling the incriminating statements made in the course of that conversation by the conversants. Respondent simply urges that the conversations in question, though containing statements tantamount to admissions of guilt, were not compelled by official authority. In the secret eavesdrop situation, there is lacking the obvious presence of official authority which is characteristic of the custodial interrogation situation. Thus, there is no inconsistency between these positions of the Respondent juxtaposed for supposed argumentative effect by Petitioner, and his comment in this regard is idle and forceless.

Petitioner also states on page 2 that Respondent has not dealt "with the problem posed by the decision of *Miranda* v. *Arizona* during the course of the trial. . ." If Respondent has omitted a detailed reply to Petitioner's *Miranda* argument, it is only because that argument is so

obviously lacking in demonstrative power that it hardly merits the attention of a reply.

Even if it be assumed, arguendo, and contrary to fact, that Petitioner's *Miranda* argument has merit, he does not show that he is entitled to assert it in this forum, because he does not allege or demonstrate in his Briefs that he preserved his constitutional claim in this regard by moving for a mistrial or making any appropriate motion for relief at the point in the trial when the *Miranda* decision was promulgated by this Court.

The essence of Petitioner's *Miranda* contention would appear to be that the *Miranda* decision, coming in the middle of the *Kaiser* trial, heightened the impression of the average individual "as to the damning nature of a true confession". But the prosecutor did not state that the conversations in question were "a true confession" or that they constituted a confession in the presence of official authority of the type given in *Miranda*. Indeed, his remarks indicated clearly to the contrary. Moreover, Petitioner cites no evidence that the jurors in the *Kaiser* trial were even familiar with the *Miranda* decision, let alone evidence that it influenced their deliberations.

Furthermore, on any rational analysis, it is difficult to conceive how the *Miranda* decision could have changed the impression of the average individual as to the evidentiary significance of a confession. It was common public knowledge, both before *Miranda* and after it, that a confession of guilt was a statement by the accused that he was guilty. It is thus hard to understand how *Miranda* could have changed the content of public understanding except upon the obviously untenable assumption that, after *Miranda*, the public mind viewed the confessor as "very guilty", whereas previous to *Miranda* they viewed him only as "guilty".

In truth, it has always been the popular view that one who confesses his guilt is guilty and that such evidence

ought to be conclusive on the issue. The Legislatures in some of the States have sought to curb the operation of this tendency of popular thought by requiring proof in addition to a confession as a pre-condition to a judgment of guilt. The *Miranda* case did not change the public conception of the significance of a confession; it simply indicated to the public what they already knew, i.e., that the introduction in evidence of a confession may play a part in producing a verdict of guilty and that the law insists, therefore, that such evidence is not admissible where it is the product of coercion. The effect of *Miranda* upon the trial in question (if, indeed, there was any effect) is more likely to have been beneficial to the defendant in emphasizing that the law regards all confessions as suspect unless they undergo an ordeal of justification.

However, the confession in *Miranda,* having been obtained by custodial interrogation, obviously had nothing in common with the admissions of guilt over the telephone involved in the *Kaiser* case. Thus even if the jurors had derived from *Miranda* a "heightened impression" of the "damning nature" of a confession obtained during custodial interrogation, that would not have influenced their belief as to the evidentiary effect of the statements made by *Kaiser* in a telephone conversation in which neither of the participants were in official custody.

B. Petitioner's "Standing" Argument in His Reply Brief Is Not Well Taken.

Petitioner argues on pages 3 and 4 of his Reply Brief that Respondent may not raise the issue of standing in this Court because the New York Court of Appeals "passed upon the issue of probable cause" and thus presumably recognized the standing of Petitioner to raise this question. Respondent discusses in its main Brief the question of whether the Court of Appeals passed upon this issue and will not repeat that discussion in this Brief. It is suffi-

cient to say that even if Petitioner's contention in this regard were correct, that would avail him little, since this Court has held that it may refuse to pass on a constitutional issue on the ground of lack of standing even where the State Court has found that the suitor has standing. (See *Doremus* v. *Bd. of Ed.*, 342 U. S. 429.)

In his argument to the contrary, Petitioner cites certain cases on page 4 of his Reply Brief, but these cases are not in point. They simply affirm the well established proposition that the Court will assume that an appellant has complied with all of the State procedural requirements necessary to the raising of a federal question in a State Court where the highest State Court finds or assumes that the question was properly raised under State law. These cases do not disturb the well-settled principle that this Court is and must be the final judge of whether a matter presented to it for adjudication is a bona fide case and controversy within the limits of the adjudicatory competence assigned to it by the Constitution. Indeed, the *Doremus* doctrine would seem to follow inevitably from the very nature of the judicial function in a political system of divided sovereignty and the inherent attributes of the judicial power, since the contrary approach urged by Petitioner would permit a State Court to determine the jurisdiction of the separate federal judicial establishment.

A reading of the record in this case (R 272-284) indicates that during the telephone conversations in question, *Kaiser* was speaking from a public telephone, rather than from a telephone in his own home and that he had no ownership interest in the Headline Bar in which was located the telephone which was used by the other participant in the conversations in question. On the basis of these facts, Respondent argues in his main Brief (see pp. 71-72) that Petitioner had no standing to raise questions as to whether the wiretap order herein complied with *Berger* criteria since, in Respondent's view, only the owner or possessor

of the premises in which the tapped telephone was located, could object, e.g., to the fact that the wiretap order permitted a 60 day tap on the telephone in question.

This view seems consistent with this Court's holdings in *Jones* v. *United States* (362 U. S. 257) and *Mancusi* v. *De Forte* (20 L. ed. 2d 1154) since *Kaiser*, during the telephone conversations here in issue, was *not present on the premises* of the Headline Bar where the tapped telephone was located. Even if it be assumed that Petitioner has standing to raise the issue of whether the wiretapping authority had justified its interception of his conversation by an adequate showing of probable cause, it does not follow that he has standing to contest the issue concerning the compliance of the order with the other criteria fashioned by this Court although nowhere mentioned in the language of the Fourth Amendment. (The question of the retroactive application of these criteria is dealt with elsewhere.)

C. Petitioner's Argument in His Reply Brief Concerning Retroactivity Should Not Be Accepted by This Court.

In the portion of his Reply Brief dealing with the retroactivity issue (commencing on page 7), Petitioner attempts to distinguish this case from *Fuller* v. *Alaska* since he concedes that "on its face ... the *Fuller* decision would appear to deprive the Petitioner of his arguments concerning the application of Section 605 to his case." It is submitted that Petitioner's attempts at distinction are uniformly unsuccessful.

Petitioner argues that the prosecutor in *Fuller* was acting in good faith. First, it may be noted that this Court, in *Fuller*, gave absolutely no indication that the prosecution's activities in *Fuller* were conducted in better faith than the evidence-gathering efforts of law enforcement officials in *Lee* v. *Florida*, or other wiretap cases. Indeed, a distinction to this effect would seem to violate the *Fuller*

rationale since the Court appears to have equated the *Fuller* situation, involving a telegram, with wiretap cases in its statement that "... the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible. Retroactive application of *Lee* would overturn every State conviction obtained in good-faith reliance on *Schwartz*". In view of this clear pronouncement in *Fuller*, Petitioner's attempts to distinguish the present case on the ground that *Fuller* involved a telegram and not a wiretap and that the *Fuller* authorities were thus operating in good faith whereas the authorities in this case were not is obviously a futile effort.

In the section of its main Brief concerning retroactivity, Respondent demonstrates in extenso that the authorities herein relied upon existing law in good faith. The *Fuller* decision can only be regarded as a validation of Respondent's contention in this regard in its holding that the rule of *Lee* v. *Florida* shall not be given retroactive effect and shall be applied only to trials occurring after the date of the *Lee* decision. Since the trial of *Kaiser* occurred long before the *Lee* decision was pronounced, it is thus not governed by the *Lee* holding that evidence violative of Section 605 of the Federal Communications Act is not admissible in State criminal trials.

Similarly ill-fated is Petitioner's attempt, on page 9 of his Reply Brief, to distinguish this case from *Fuller* and to equate it with *Lee* on the theory that both *Lee* and *Kaiser* were before this Court "at the same time with the same issue", whereas the Petitioner in *Fuller* was not granted review until October 28, 1968 when the judgment of conviction was affirmed by this Court. Even assuming the correctness of Petitioner's statement of fact in this regard, the factual circumstances which he cites do not have the legalistic significance Petitioner assigns to them and would afford no justification in themselves for a decree of retroactivity in this case even in the absence of this Court's statement in *Fuller*.

The issue of retroactivity was decided in *Fuller* and other retroactivity cases on the basis of such momentous considerations as whether retroactivity would seriously burden our system of criminal justice. Certainly the trivial factor Petitioner cites can not weigh more heavily than the fact, found in *Fuller,* that retroactivity would needlessly overturn State convictions. Moreover, in view of the language of the *Fuller* decision, Petitioner's thesis may only be regarded as fanciful since this Court, in *Fuller,* sanctions no such principle of distinction as that urged by Petitioner, and, indeed, clearly and unequivocally indicates that its decree of "no retroactivity" shall be given blanket application in its statement that "the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*"

Petitioner argues that this is a case of first impression because it involves wiretapping and therefore the application of the *Berger-Katz* rules to this case would not amount to a retroactive adjudication. This view seems questionable at best. Even though it can be argued that the Court has not yet brought wiretapping within the regulatory scope of the Fourth Amendment, the fact is that the *Katz* and *Berger* cases declared the requirements for eavesdropping warrants and so this case would merely constitute an application of the *Berger-Katz* criteria to the facts herein presented, rather than a first statement or a first impression treatment of the standards which the Fourth Amendment mandates with respect to eavesdrop orders. Thus it may be seen that under no conceivable analysis can this case be viewed as one of first impression in the sense that the *Miranda* and *Berger* cases were, and it follows that an application of the *Berger-Katz* doctrines to this case would constitute a retroactive adjudication.

It may be noted in passing that if this Court accepts Respondent's argument concerning abatement it will be unnecessary for it to reach the issue of retroactivity with

respect to Section 605. Respondent argues in Point III of its main Brief (p. 79) that, in accordance with the doctrine of *Hamm* v. *Rock Hill,* this Court should hold that the recent enactment by Congress, after the granting of certiorari herein, of the Omnibus Crime Control and Safe Streets Act of 1968 abated and rendered inoperative the provisions of Section 605, since that Act explicitly repealed 605. This abatement argument was not advanced or considered in *Lee* v. *Florida* or *Fuller* v. *Alaska* and Respondent respectfully urges that it be accepted on this appeal because a contrary holding would, in effect, decree that although, for 34 years, it was the policy of the federal government and all of its agencies, judicial, legislative and executive, not to treat State wiretapping as violative of federal public policy, that approach should now suddenly be reversed by a policy that, for the first time, enforces 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

Respondent would also like to suggest to the Court a slight modification of the *Fuller* rule so as to eliminate the limited retroactive effect of the *Fuller* decision. *Fuller,* in applying the *Lee* v. *Florida* doctrine to trials occurring after the date of the *Lee* decision, was in effect providing that wiretaps authorized and obtained perhaps years before the *Lee* case in accordance with the constitutional principles then accepted were inadmissible in evidence where they were introduced in trials after *Lee.* The effect of this rule of limited retroactivity will be that many major felony cases based upon wiretap orders issued before the *Lee* decision will now be subject to dismissal because of the inadmissibility of vital wiretap evidence.

Respondent respectfully asks that this Court in this case dispel the limited retroactive effect of *Fuller* by framing a decision, in accordance with the theory of the *Stovall* rule,

which provides that all wiretap orders issued before the date of the *Lee* decision and all official wiretapping occurring before the date of *Lee* shall not be subject to the *Lee* doctrine. By this statement this Court will save many felony prosecutions from failure and will avoid the undesirable result of punishing wiretapping officials for relying upon existing law and for not anticipating, at the time of the wiretapping, a *Lee* rule which this Court itself had perhaps not yet planned or imagined at the time the wiretapping was conducted.

The rationale of *Fuller* would seem no obstacle to the enunciation of the principle here contended for since it is stated in *Fuller* that retroactive application of *Lee* "is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose . . ." In view of this unqualified assertion that retroactivity is not necessary, there would seem to be no good reason why even a limited retroactivity should be enforced.

The modification of *Fuller* here sought may be achieved by the Court without overruling itself since the statement in *Fuller* that trials occurring after the date of the *Lee* decision would be subject to the *Lee* rule was dictum. The most that the *Fuller* case really decided was that retroactivity would not be decreed where the evidence gathering violative of Section 605 and the divulgence of that evidence at the trial occurred before the *Lee* decision. Of course, under the *Fuller* decision, the *Lee* rule is not retroactively applicable on this appeal, since the wiretapping and the trial of *Kaiser* were consummated before the *Lee* decision was announced. However, in the light of this Court's declaration in *Fuller* that "prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno*, 388 U.S. 293, 297" and in view of the needless damage that would be done to pending prosecutions based upon wiretap evidence by the limited principle of retroactivity discussed above, it is respectfully prayed that

this Court implement the purposes and value judgements that it articulated in *Fuller* by making a clear pronouncement in this case that criminal trials occurring after *Lee* need not be dismissed where they are based upon wiretap evidence obtained prior to this Court's decision in *Lee* v. *Florida*.

Unless this Court speaks out unequivocally at this time, State Judges may feel that they have no alternative but to dismiss on motion all pending prosecutions based upon wiretap evidence where such evidence is not authorized and obtained under the enabling provisions of the new permissive federal legislation set forth in the recently enacted Safe Streets Act. Such an unfortunate state of affairs would doom to failure a substantial catalogue of important felony and organized crime prosecutions presently pending in this office as well as cases of similar magnitude in many other jurisdictions.

On Pages 33 through 35 of his Reply Brief, Petitioner advances a new argument in support of his prayer that principles of law articulated after the trial in this case should be applied retroactively so as to work a reversal of the judgment of conviction herein. He declares that it is open to a defendant on direct appeal to attack "the actual oppression which the Constitution seeks to prevent. In elaborating his thesis, Petitioner states that "*Johnson* v. *New Jersey*, 384 U.S. 719, which set the timetable for the new confession rules, was concerned not with fundamental rules, but rather intermediate rules. What we mean is that the basic Constitutional question involved was that of coerced confessions. The new rules were geared toward minimizing the incidence of coerced confessions. *Johnson* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually coerced confession."

It is a sufficient response to this argument to observe that the Court has never propounded such a distinction

as a determinant of decision in its retroactivity jurisprudence. One may search its *Johnson* decision in perpetuity without ever finding the slightest indication that the Court was guided by any such considerations as that now advanced by Petitioner.

In addition, Petitioner's thesis is based upon a failure of analysis. Petitioner to the contrary, *Miranda* was not concerned with "intermediate rules", but with "fundamental rules". In *Miranda,* this Court held that the failure to give the *Miranda* warning resulted in a situation in which the confession was compelled in violation of the privilege against self-incrimination. Thus, it violates the doctrinal essence of *Miranda* to say that the "basic constitutional question . . . of coerced confessions" was not involved.

Petitioner's discussion in this connection of the *Stovall* decision is equally faulty. Petitioner's claim to the contrary notwithstanding, the *Stovall* decision *does* involve "the actual oppression which the Constitution seeks to prevent" rather than a mere intermediate rule, since *Stovall* indicates that the absence of counsel in some situations amounts to a deprivation of due process.

D. There Is No Merit in Petitioner's Contention that Section 605 Broadened the Enclave of Privacy Guaranteed in the Fourth Amendment so as to Include Telephone Conversations within the Scope of Its Safeguards while, at the Same Time, Excluding Telephone Conversations from the Permissive Warrant Provisions which, by the Clear Terms of the Fourth Amendment, Are Applicable to All Classes of Evidence Gathering Activities within Its Regulatory Ambit.

Respondent argues in his Brief (pp. 40-42) that, contrary to Petitioner's claim, Section 605 of the Federal Communications Act may not enlarge the scope of the Fourth Amendment's protection and may not exclude any regulated class within the control of the Fourth Amendment from the Fourth Amendment's permissive warrant provisions, since

a mere statutory enactment can not amend or abrogate provisions of the Constitution. Having failed to formulate in his main Brief a tenable legalistic underpinning for his extraordinary contention in this regard, Petitioner attempts to provide a rationale in his Reply Brief, again without success.

Discussing this thesis on page 14 of his Reply Brief, Petitioner makes the startling observation that "Congressional legislation is not here at war with the Constitution, but, rather, in protecting the integrity of the communications system it is acting pursuant to the Commerce Power granted to it by Article I, Section 8 of the Constitution. Section 605 is not, therefore, a 'mere statutory enactment'; it is the implementation of an absolute Congressional power granted by the Constitution. The Respondent's argument is grounded upon a fallacious understanding of Congressional power".

It may be said in reply to this unique conception that it does violence to every known theory of constitutionalism. The only "fallacious understanding" exhibited on this point is that of Petitioner. Apparently he has not yet attained to that minimum understanding of the fundamentals of constitutional law which would have enabled him to perceive the really elementary distinction between a constitutional grant of power and a governmental exercise of that power. Petitioner fails to grasp the obvious fact that all valid federal legislation is an "implementation of an absolute Congressional power granted by the Constitution itself". Indeed, Congress may legislate only in "implementation" of the constitutional grant of authority, and if Petitioner's theory be accepted, one must conclude that it is the design of our constitutional scheme that Congress, in the day to day exercise of its legislative powers, may operate as a constitutional convention in continuous session.

E. Petitioner's Comments Concerning Respondent's Argument Against National Judicial Control of Local Telephonic Communication Is Ill-Founded.

On page 16 of his Reply Brief, Petitioner declares that Respondent has argued for local control over the privacy of communications and that this argument "is absurd in light of the national and the international nature of the telephone system. *Cf. Weiss* v. *United States,* 308 U.S. 321".

Here again, Petitioner has totally misunderstood the trend of Respondent's argument. Respondent was not, at that point, contesting the power of Congress to regulate telephonic communications. Thus Petitioner's comment and citation of the *Weiss* case are completely inappropriate. Respondent was urging the different thesis that official wiretapping should not be constitutionalized by a federal appeals court in the absence of language in the Fourth Amendment requiring it, because to constitutionalize this subject by judicial pronouncement is to remove it from the control of the legislative power and to foreclose all future experiment.

F. Petitioner's Arguments in Opposition to Respondent's Contention that Fourth Amendment Protections Should Be Circumscribed by a Contact Theory Are Lacking in Force.

On page 20 of his Reply Brief, Petitioner condemns Respondent's "speculation concerning the possible results of a determination in the Petitioner's favor" and then proceeds to indulge in the same practice himself. However, Petitioner's speculations are less obviously appropriate since the developments he envisages are not viewed as resulting from the decision of this Court, as are those discussed in Respondent's Brief.

In his analysis of Respondent's "contact" theory, Petitioner declares that it would render the Fourth Amend-

ment a nullity since it would remove from the ambit of its regulation all evidence gathering techniques not based upon physical contact with a place in which the evidence was located. In this view, Petitioner is clearly mistaken. The Fourth Amendment, by its language, does not deal with non-contact situations, but, on the contrary, deals only with circumstances of physical contact. It follows that an adjudication which does no more than corroborate the objective meaning of that Amendment's language can hardly be said to render it a nullity, however consistent or inconsistent that adjudication may be with other decisions of this Court.

Petitioner makes the surprising comment on page 21 of his Reply Brief that the Respondent offers no rationale for the contact theory "other than that it would permit certain wiretapping". One can only conclude that Petitioner has not carefully read Respondent's Brief; if he had, he would have become aware that Respondent's contact theory is justified by a carefully stated rationale founded upon the dual considerations of constitutional doctrine and judicial high policy. It would serve no useful purpose to restate Respondent's carefully developed line of argument at this point; instead the Court is respectfully referred to pages 42 through 56 of Respondent's Brief and the rather elaborate body of insights there set forth.

Petitioner argues on page 21 of his Reply Brief that Respondent's contact theory is inconsistent with this Court's holding in *Katz*. However, as Respondent indicates on pages 43 through 45 of his main Brief, the precise contents and scope of the *Katz* holding are not free from doubt and the Court should use this case as a vehicle of clarification so as to achieve those proper objectives of a sound judicial statesmanship which Respondent commends to its attention.

Petitioner claims on pages 22 and 23 of his Reply Brief that "the 'contact' which the Respondent" envisions "was in fact present in the instant case" since the wiretap equipment was installed in the basement of the hotel in which the Headline Bar was located. It is true that the wiretap equipment was installed in the hotel basement. However, the wiretap equipment did not make contact with the structure in which was located the telephone instrument on which the conversations in question took place. The telephone instrument was in the Bar on the floor above the basement. The basement of the hotel was divided by a physical partition so as to allocate a segregated portion of the basement underneath the Headline Bar for the use of the Headline Bar. The wiretap equipment was never placed within the portion of the basement allocated to the Headline Bar nor did it ever come into physical contact with the wall or partition marking off and bounding this portion of the basement. On the contrary, the equipment was located in the part of the basement used by the hotel, and, since the hotel was a busines separate from the Headline Bar operation, it can hardly be said that the wiretap equipment made contact with the structure in which occurred the overheard telephone conversation.

If Petitioner's argument to the contrary be accepted, it would follow that a guest in any hotel room in the building has standing to object to the legality of a search anywhere in the building outside of his own room.

The record shows (R. 140) that the wiretapping detectives obtained permission from a hotel official to place the wiretap equipment in the basement of the hotel. Thus even if the Headline Bar had used this same portion of the basement, the wiretapping in question would not have constituted a trespassory eavesdrop. Indeed, even if the place where the wiretap equipment was located be considered a portion of the Headline Bar establishment, the same legal conclusion is pertinent. The hotel official's

permission to install the equipment amounted to a consent just as surely as if the proprietor of the Headline Bar had consented to the installation of eavesdrop equipment in the Bar. Therefore, even if the wiretapping herein was regulable under the Fourth Amendment, and was considered a search, it amounted to a consent search.

It follows that all questions as to the validity of the form of the wiretap order and its execution are thus waived or rendered academic, just as they would be if an official with a defective search warrant were permitted to search a premises by consent of its owner. Moreover, the defendant did not raise the trespass argument at the trial or cite it to the Court as the basis for an objection to the admission in evidence of the wiretaps nor was it raised on appeal until the submission of Petitioner's Reply Brief in this Court.

G. Petitioner's Reply Brief Does Not Effectively Deal with Respondent's Contention that the Telephone Conversations in Question Did Not Occur in a Situation of Privacy.

The protected classes enumerated in the language of the Fourth Amendment are "persons, houses, papers and effects" and thus a crucial issue in this case (at least in the light of this Court's decisions before *Katz*) is whether the public bar where the phone instrument in question was located had sufficient attributes of the privacy of a home to activate the Fourth Amendment (see *Lanza* v. *New York*, 370 U.S. 139, 143). If the area in which the overheard conversation took place was one which could have been searched for physical objects without a warrant (and the Headline Bar is such an area since it is a public bar and is subject to extensive governmental regulation), then an eavesdrop in the area might proceed without a warrant (*Lanza* v. *New York*, 370 U.S. 143-144, n. 14).

Some observers may view *Lanza* as a "protected area" case and as rendered obsolete by *Katz*. However, Re-

spondent urges that the *Lanza* doctrine may be assimilated to the *Katz* approach (even assuming, contrary to the opinion of Justice Harlan, that *Katz* totally repudiated the protected area rule) since the rationale of *Lanza* may be interpreted as based upon the finding that the area in question—there a jail visiting room—was not private in character and since the *Katz* rule of justifiable expectation of privacy seems founded upon a similar objective test of whether the situation in which the conversation occurred was so private in nature as to give rise to a reasonable expectation of privacy.

Moreover, it would appear that *Katz* did not really reject the protected area theory. The *Katz* rule seems to mandate Fourth Amendment protection where there is a justifiable expectation of freedom from governmental intrusion of the type involved in *Katz*. In *Katz*, the intrusion involved was *electronic* penetration of the place or location in which the defendant was talking. There was no such penetration on this occasion. That this interpretation of *Katz* is correct may be gathered from this Court's language interpreting *Katz* in its later decision in *Mancusi* v. *De Forte* (20 L. ed. 2d 1154) where, on page 1159, this Court said: "The Court's recent decision in *Katz* v. *United States* . . . also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded *place* but upon whether the *area* was one in which there was a reasonable expectation of freedom from governmental intrusion . . . The crucial issue, therefore, is whether, in the light of all the circumstances De Forte's office *was such a place*". (Emphasis supplied.)

H. Petitioner's Objections to Respondent's Argument that the Wiretap Order Herein and Its Execution Were Not Violative of Fourth Amendment Standards Is of Questionable Force.

On page 30 of his Reply Brief, Petitioner addresses himself to Respondent's contention that the overheard con-

versations were not "seized" within the meaning of the Fourth Amendment when they were overheard, but, only, if at all, when they were used in Court. Petitioner declares that "this preposterous assertion is devoid of any logic whatsoever". Presumably, then, Petitioner would also regard as "preposterous" the view that Mr. Justice Harlan expressed in dissent in *Berger* v. *New York* to the effect that "'conversations are not 'seized' either by eavesdropping alone, or by their recording. . . Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversations beyond the initial listening process is required for the seizure of the spoken word. . .'" (388 U.S. 41, 98-99).

On page 32 of his Reply Brief, Petitioner appears to argue that wiretapping can not easily be brought within the permissive scheme set forth in the warrant clause of the Fourth Amendment because that clause does not contemplate an authorizing warrant permitting the seizure of something which has not yet come into existence. The short answer to this observation is that it proves only, if anything, that wiretapping is not controlled by the Fourth Amendment and that the difficulty which Petitioner mentions arises from an attempt to apply the Fourth Amendment to a situation which is not contemplated by its language or legislative history.

However, if the Court should hold that wiretapping is within the regulatory ambit of the Fourth Amendment, it would follow that the permissive authorization of the warrant clause of that Amendment would apply to wiretapping as well as to all other related categories of evidence gathering within the governance of the constitutional provision on search and seizure. A different holding would amount to a re-writing of the Fourth Amendment's warrant clause so as to incorporate within its language a provision excluding one particular form of evidence gathering—i.e., wiretapping—from that broadly inclusive language of the warrant clause which seems to comprehend within its scope

all of the official activities within the control of the Fourth Amendment.

On page 25 of his Reply Brief, Petitioner declares that Respondent's arguments to the effect that the telephone conversations did not occur in a situation of privacy is interestingly contrasted "with his later argument that notice need not be given upon the execution of a wiretap warrant" because it would warn the conversants that their conversation was being overheard. It is difficult to determine from this vague allusion exactly why Petitioner finds this so called contrast interesting. If he means to suggest that it reflects an inconsistency he is surely mistaken.

First of all, Respondent's argument that the requirement of notice be dispensed with was a general one based upon a general view of the effect of requiring prior notice; it was not specifically directed to the facts of this case. Furthermore, Respondent's contention that the conversations in question did not occur in a situation of privacy was not based upon the view that the conversants were aware that they were being overheard, but on the different conclusion that the objective facts of the situation would not justify a reasonable man in expecting privacy. Petitioner responds, on page 25 of his Reply Brief, to Respondent's argument that such a rigorous regime of control would seriously dijectionable where it fails to conform to a nicety with all of the eavesdrop criteria read into the Fourth Amendment in such cases as *Berger*. Respondent argued in his Brief that such a rigorous regime of control would seriously diminish the availability of wiretap evidence and that a judicious balancing of interests counsels some relaxation of *Berger* type standards in wiretap cases. Respondent cited this Court's *Camara* decision in support of this approach.

Petitioner, on page 25 of his Reply Brief, argues that *Camara* can not be cited for the proposition that wiretapping should be governed by separate criteria. However, Respondent did not cite it for this narrow proposi-

tion but rather as authority for the contention that the warrant clause of the Fourth Amendment may receive a relaxed interpretation in appropriate situations.

I. Respondent's Imaginative Rehearsal of the Possible Consequences of a Decision in Favor of Petitioner Was Well Within the Limits of Sound Constitutional Advocacy and Petitioner's Objection to This Methodology of Argumentation Proceeds from an Imperfect Understanding of the Demands of Judicial Statesmanship or the Nature of Judicial Policy Making.

On pages 20 and 38 et seq. of his Reply Brief, Petitioner appears to suggest that it is not the function of constitutional advocacy to suggest to this Court the possible practical and legalistic results of alternative forms of decision. Petitioner's viewpoint seems to proceed from an insensitivity to the imperatives of judicial statesmanship in a political scheme in which the constitutional court exercises substantial policy making powers.

In the judicial interpretation of vague constitutional texts, adjudicatory discretion is left at large and constitutional adjudication is thus a largely autonomous process of policy making. Thus it is important that the judging tribunal identify all of the social interests which may be affected by its act of decision and foresee, so far as possible, the relative effects on these interests of a given form of decision. In the absence of such judicial forevision, constitutional judgment would operate blindly and with indifference to the practical effects of its performance. If constitutional advocacy is not permitted to pose those possibilities inherent in the context of adjudication, it will fail in its responsibility of giving meaningful assistance to those who were charged with the excruciating burden of decision. There seems to be no sound principle on which such a stringent limitation of the role of constitutional advocacy may be justified.

In the nature of the case, the possible consequences of judicial decision must be posed in speculative terms. Indeed, even in the legislative forum, the prospective results

of policy making decisions can not be rendered in predictive statements framed in terms of certainty. No doubt it was its recognition of the essentially tentative nature of the process of official decision making which prompted this Court to indicate in *Noble State Bank* v. *Haskell* (219 U.S. 104) that legislative policy may properly rest upon possibility rather than certainty and that the Constitution does not require that the exercise of government be founded upon a prophetic vision beyond the power of human intellect to attain.

In responding to what he conceives to be the philosophic standpoint exhibited in Respondent's Brief, Petitioner declares, in implied criticism of Respondent's approach, that "to cast the issue in activist and anti-activist terms is simply to avoid the issue"; but the Respondent did not cast the issue in these simple terms; to argue thus is to abstract a phrase from the context of a developed formulation and to violate by omission the full intent of Respondent's argument.

CONCLUSION

The Judgment of Conviction Should Be Affirmed.

Respectfully submitted,

WILLIAM CAHN,
District Attorney, County of Nassau.

GEORGE DANZIG LEVINE,
Assistant District Attorney,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

NOTICE OF MOTION AND RESPONDENT'S SUPPLEMENTARY BRIEF

WILLIAM CAHN
District Attorney, County of Nassau
State of New York
Attorney for Respondent
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
Assistant District Attorney
of Counsel

INDEX

PAGE

Notice of Motion 1

Respondent's Supplementary Brief:

Introduction 3

Argument:

A. If this Court should declare official wiretapping to be within the regulation of the Fourth Amendment, whether on the basis of a broadly-conceived formulation of the *Katz* personal privacy doctrine, or by an extension of traditional search and seizure analysis, the process of law enforcement would be seriously compromised 4

B. Respondent's abatement argument and its prayer that the court modify the *Fuller* v. *Alaska* doctrine should be considered by this court, since respondent may not be able to assert these legal grounds effectively through any other avenue of recourse 12

Conclusion 21

Cases Cited

Benanti v. U.S., 355 U.S. 96 20

Hamm v. Rock Hill, 379 U.S. 306 19

Lanza v. New York, 370 U.S. 139 (1962) 5

Nardone v. U.S., 308 U.S. 338 20

People v. Alfinito, 16 N.Y. 2d 81 18

People v. Cohen, 42 Misc. 2d 403, 24 A.D. 2d 900, 2d Dept. 1965, affirmed without opinion, 18 N.Y. 2d 605 ..... 13, 14

PAGE

People v. Dimmie, 42 Misc. 2d 521, aff'd without opinion, 15 N.Y. 2d 578 ..... 15, 17

People v. Fay, 268 App. Div. 135 18

People v. Habel, 18 N.Y. 2d 148 14

People v. Laverne, 14 N.Y. 2d 304 15

People v. McCall, 17 N.Y. 2d 152 14

Statutes Cited

Code of Criminal Procedure:

Section 518 ..... 13, 15, 17, 18

Section 521 15

Section 751 ..... 15, 17

Section 813c 13, 14, 15

Constitution of the United States:

Fourth Amendment 4, 5, 6, 8, 9, 10, 11, 12

Fourteenth Amendment 4

Nassau County District Court Act:

Section 230 15

Omnibus Crime Control and Safe Street Acts of 1968:

Section 605 ..... 19, 20, 21

Authorities Cited

Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195 (1954) 19

Hoover, 58 Yale L.J. 422 (1949) 20

Katzenbach, 32 FRD 107 20

Prof. Edmund Kitch "Katz v. U.S.", The Supreme Court Review, 1968, pages 137-38 ..... 5, 9

Rogers, The Case of Wiretapping, 63 Yale L.J. 792 (1954) 19

IN THE

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No. 62

THOMAS R. KAISER,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Notice of Motion

Respondent hereby respectfully moves for leave to file the supplementary brief which accompanies this application. This cause was argued on January 16, 1969. In this supplementary brief, Respondent respectfully brings to the Court's attention certain developments of which counsel has become aware since the briefing and oral argument of this case. Since these developments relate to Respondent's argument in this case, as developed in its briefs and at the oral argument, a portion of Respondent's argument is summarized in the discussion in connection with the treatment of these developments.

It is respectfully submitted that the discussion in this supplementary brief will provide substantial assistance to the Court in its difficult task of judgment in a case critically important in its implications for the future of law enforcement in a free society.

Notice of Motion

Respectfully submitted,

WILLIAM CAHN
District Attorney, County of Nassau
State of New York
Attorney for Respondent
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
Assistant District Attorney
of Counsel

IN THE

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October Term, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S SUPPLEMENTARY BRIEF

Introduction

This cause was argued before the Court on January 16th of this year. In this supplementary brief, Respondent respectfully brings to the Court's attention certain developments of which counsel has become aware since the briefing and oral argument of this case.

Since these developments relate to Respondent's argument in this case, as developed in its Briefs and at the oral argument, a portion of Respondent's argument is summarized in the ensuing discussion in connection with the treatment of these developments.

ARGUMENT

A. If this Court should declare official wiretapping to be within the regulation of the Fourth Amendment, whether on the basis of a broadly-conceived formulation of the *Katz* personal privacy doctrine, or by an extension of traditional search and seizure analysis, the process of law enforcement would be seriously compromised.

Respondent has argued that this Court should not declare official wiretapping to be within the control of the Fourth Amendment, and that, even if it does, the *Berger* and *Katz* rules should not be enforced in this case since the wiretapping here in question and the trial in this case occurred before these decisions were announced.

Respondent urged that the language of the Fourth Amendment, and especially the narrowly confining phraseology of its Warrant clause, seems not to include eavesdrops of conversation within the scope of its regulation and to confirm the validity of the "contact" theory commended to the Court by Respondent as the proper determinant of Fourth Amendment protection. On both a semantical and historical analysis of the Fourth Amendment, it is clear that it was not designed to protect the *kind of interest* which is sought to be vindicated by those who seek constitutional protection for telephonic secrecy. Therefore, it can not be argued validly that the "underlying purpose" of the Fourth Amendment justifies the expansion of its coverage to include types of surveillance unknown when the Fourth and Fourteenth Amendments were drafted.

It is true that, in *Katz,* this Court rejected the trespass and physical penetration tests which had been approved in earlier cases, and, in doing so, overruled the *Olmstead* case. However, it may be argued that *Olmstead* was overruled only to the extent that it sanctioned the trespass doctrine and not in its ultimate holding that wiretapping was not within the control of the Fourth Amendment. The

Court might well invoke an alternative rationale, *e.g.*, Respondent's contact theory, to reach the same result as that contrived in *Olmstead.*

It is also true that the Court declared in *Katz* that "the Fourth Amendment protects people and not simply 'areas' " but the full implications of this statement await development in later formulations of this Court. Mr. Justice Harlan, concurring in *Katz,* seemed to argue that the Court in *Katz* had not propounded a radical doctrine of privacy which would protect personal privacy in all contexts unrelated to a place or area. One authority has interpreted Justice Harlan's understanding of the Court's decision in *Katz* as indicating that the Court extended Fourth Amendment protection in *Katz* because the electronic surveillance of the telephone booth there involved was equivalent in effect to a physically intruding ear. (See the recently published article by Prof. Edmund Kitch, "*Katz* v. *U.S.*", The Supreme Court Review, 1968, page 137-8.) The same commentator has suggested that *Katz* may be interpreted in this narrow way but that it may also be construed broadly to include within the scope of the Fourth Amendment *any* official intrusion on privacy by any investigatory device (Kitch, *supra,* p. 138).

It is true that *Katz* seemed to reject the simplistic statement of the "protected area" concept propounded in such cases as *Lanza* v. *New York* (370 U.S. 139, 1962). But it can be argued that what the language in *Katz* was condemning was an abstract, a priori characterization of given types of places or areas as private (*e.g.*, a home, private office) without attention to the particular facts of the situation in question to determine whether *in those circumstances* the conversant could justifiably expect privacy. In this view *Katz* merely stands as a bar to a mechanical application of an abstract, protected area test; it simply adds a refining criterion to that test and does not abrogate the long accepted view that Fourth Amendment protection of personal privacy is tied to a protected area or place.

In Respondent's view, the Court should *follow this conservative approach and should not jettison the protected area principle completely because it will then be cast on a sea of uncertainty with no clear standards to guide the adjudications of lower courts or the actions of police officers.* If wiretapping is declared to be regulated by the Fourth Amendment and if *Katz* were to be applied to this case retroactively in a decision pronouncing a thoroughgoing doctrine of personal privacy divorced from all association with the protected area concept, this would render constitutionally suspect all types of privacy-invading police investigative devices indulged in without a warrant and make the chief business and burden of lower courts the endless issuance of warrants.

It is respectfully urged that, although the Court has dispensed with the need of trespass or physical intrusion as a condition of Fourth Amendment protection, it should still require some physical *contact* (if not a trespass or physical intrusion) to activate that Amendment. Such a requirement would be a natural progression in an evolving thread of doctrine which previously advanced from the onerous *Olmstead* trespass restriction to the less burdensome physical intrusion principle articulated in *Silverman.* The progression from the *Silverman* physical intrusion test to the minimum contact theory thus does no violence to the normal processes of doctrinal development. Moreover, since *there was physical contact in Katz,* it is not clear that *Katz* really holds any more than this.

To the extent that the Court views Katz as going beyond the doctrinal limits here commended, it is respectfully prayed that the case should be reconsidered. Constitutional adjudication must respond to the imperatives of practical necessity. If the *Katz* doctrine is not so confined, it may be argued that non-electronic overhearing of conversations between criminals talking confidentially in a street or park or at a secluded table in a public restaurant

or airline terminal will be within the control of the Fourth Amendment and may proceed only with the permission of a warrant.

Indeed, a *Katz* doctrine shorn of a physical contact limitation would imply that invasion of privacy by visual surveillance, with or without aid of a telescope, flashlight or binoculars, may only proceed under authority of a warrant. Thus looking through a keyhole, or peering into a room through the unsuspected opening in window blinds, or eavesdropping without electronic aid outside of a door to a room or outside of a window of a house, which room or house may reasonably be presumed by the conversants to be isolated and in a secret location, would become a major operation requiring judicial validation after burdensame presentation of proof (and usually such proof would not exist).

This result would follow even under Mr. Justice Harlan's interpretation of *Katz*, which may be read as suggesting that although place is a predicate of protection, the constitutional guarantee will be activated where the place or protected area is penetrated by any auditory or visual means, even where these do not involve physical contact with the place in question.

An unlimited *Katz* doctrine may even prohibit official encroachment on privacy in public places unless a warrant is obtained. It has been suggested that what occurs in public is not protected. But it can be argued that the *Katz* test of *justifiable reliance on privacy* may throw the mantle of protection around situations where, for example, a narcotics distributor with a reasonable expectation of privacy is passing narcotics to a pusher in a dark and apparently deserted corner of a park that is suddenly lit up by a police flood light or where criminal activity is occurring in an isolated field, apparently free of spying eyes or ears, but actually surveilled by a policeman one mile away looking through a telescope or employing electronic eavesdropping equipment.

Under a radical personal privacy doctrine, almost all official investigative devices would require the sanction of a warrant. Such a regime would overburden the courts to the point where they would have time for little else. Also, it would deal a paralyzing blow to law enforcement, since shadowing and covert visual observation are used to obtain evidence amounting to probable cause so as to enable the procurement of search warrants. Ordinarily, these preliminary investigative techniques can not also be justified by a showing of probable cause, since, in the early stages in which they are employed, there is usually little evidence available. Obviously, at the beginning of an investigation, proof amounting to probable cause does not exist, and if it is insisted that no investigation may begin until such a quantum of evidence has been obtained, it will not be possible to conduct any investigation at all, especially in organized crime cases where it is difficult to get eye witness testimony and where secret informer tips must be corroborated by privacy-invading investigative techniques.

Unless this Court confines the scope of the *Katz* rule, its doctrinal implications may, especially if seemingly affirmed by a broadly conceived later formulation, induce lower courts throughout the country to rule inadmissible all evidence obtained by any privacy invading technique unauthorized by a warrant. At the least, it would impose upon the courts a staggering burden of evidence-suppression hearings at a time when they are already overloaded to the point of collapse.

Under a "contact" theory, most official wiretapping would not be within the scope of the Fourth Amendment, since such wiretapping usually occurs at some distance from the place in which the overheard telephone is located. That was true in this case. Here the wiretapping equipment was in the basement of the hotel. The hotel allotted space on its first floor to the Headline Bar in which

the overheard telephone was located. Thus the wiretap equipment had no contact with the Headline Bar premises. Actually, the Headline Bar used a different portion of the basement which was segregated by a wall partition from the remainder of the basement wherein the wiretap equipment was located, although this does not appear in the record. And even if the entire basement were part of the bar premises, which it was not, the placing of the wiretap equipment in the basement would amount to a consent search, if the Fourth Amendment were applicable, because a hotel representative permitted the detectives to place the equipment there (Appendix, 140).

Moreover, the overheard telephone had two extensions and was in a public bar so Conte, talking from the bar, could not justifiably rely upon a situation of privacy nor could *Kaiser*, talking from a public place of employment, since he must have known the telephone set up at the Headline Bar, having worked there on weekends as a bartender. That he knew the telephone was in a public place is indicated by the form of address of the person answering the phone at the Headline Bar when *Kaiser* called there (*e.g.* "Headline Lounge"; see page 269, Appendix).

This Court indicated as late as the *Lanza* decision that where the area eavesdropped was one which could have been searched for physical objects without a warrant then an eavesdrop might proceed without a warrant. A similar approach is noted in the recent commentary concerning the *Katz* case (see Prof. Edmund Kitch, "*Katz* v. *U.S.*", Supreme Court Review, 1968, page 137). A public bar is subject to search by public officers under Fourth Amendment doctrine and under the state law and liquor authority regulations.

It is respectfully urged that this Court should not read the Fourth Amendment as it has been urged to do by proponents of a broad interpretation of *Katz*. If it leaves the

safe shelter of traditional Fourth Amendment principles, judicial discretion will *wander at large, bereft of those guiding techniques of interpretation which give the certainty and predictability* on which law enforcement must rely if it is to achieve an effective performance.

If the Court should place its stamp of approval on an extreme personal privacy reading of the Fourth Amendment, then it will take years for it to fashion limiting principles, and even those it formulates are unlikely to instruct the police functionary to a clear forevision of what particular situations are private in contemplation of law and beyond his investigatory power. This conclusion proceeds from the insight that once the relatively definite "protected area" and "physical contact" concepts are discarded, the only technique of discrimination will involve the subjective process of interest balancing or the difficult task of discovering and judicially sustaining popular notions of privacy with all of their fluctuations and obscurities. Such a judicial regime will constitute a continuing exercise in subjectivism.

The interest-balancing technique yields ad hoc, particularized judgments rather than clear general rules. The proposed "contact" theory would afford police officers a simple workable test of when they must procure a warrant. Unless the *Katz* doctrine is so limited, it will either be applied so as to require a warrant with respect to every investigatory act—an impossibly burdensome regime of practice—or, if the rigor of such a principle is sought to be tempered by a judicially-derived limiting principle, it will institutionalize a condition of continuing confusion in that field of endeavor whch is crucial to the maintenance of those conditions of public order which are the minimum requirements of civilized society. It seems inconceivable that an enlightened community should interpret its Constitution—the document ordaining the organic principles of its survival—as demanding such a continuing threat to the foundations of social organization.

In its main Brief in this case, Respondent predicted that the "personal privacy" language of the *Katz* decision might induce lower courts to adopt an extreme privacy doctrine requiring that all types of privacy-invading official investigatory activities be authorized by warrant. This prophecy seems to have been borne out by developments occurring since the *Katz* case.

For example, in a recent decision in New York, *People* v. *Jennings and Stas*, a New York court, the Appellate Term for the Ninth and Tenth Judicial Districts, Second Department, has expressed such an extreme reading of *Katz*. The text of that court decision is as follows:

> "Judgments of conviction unanimously reversed on the law and facts and complaints dismissed.
>
> The police officer's observation of what appeared to be a small flickering light through the drawn drapes of a motel room, without any accompanying circumstances other than voices and laughter emanating therefrom, furnished no reasonable grounds for believing that a crime was being committed in the said room or that the occupants therein were in any imminent danger. Consequently, the act of the officer in stooping down to look into the room through a three-inch space between the windowsill and the bottom of the drapes constituted an unlawful invasion of defendants' right of privacy (*Katz* v. *United States*, 389 U.S. 347; *State of Texas* v. *Gonzales*, 388 F 2d 145; see *People* v. *Gallmon*, 19 N Y 2d 389, cert. den. 390 U.S. 911; *People* v. *Terrell*, 53 Misc 2d 32). Under the circumstances, the motion to suppress the evidence obtained by this means should have been granted. Since it does not appear that the People have any other evidence, the complaints should be dismissed."

It should be pointed out that even if the Court should avoid enunciating a full-blown privacy doctrine and instead should bring wiretapping within the goverance of the Fourth Amendment by an extension of traditional search

and seizure doctrine, the consequences may be almost as disastrous for law enforcement as if a broad reading of *Katz* were the basis of decision. That this is so may be inferred from the fact that wiretapping (and the wiretapping in this case) is conducted without physical contact with the place in which the conversing party is located. If such an evidence-gathering technique is within the scope of the Fourth Amendment, it would follow by implication that other types of investigatory activity not involving physical contact are also subject to the warrant requirements of that Amendment.

B. Respondent's abatement argument and its prayer that the court modify the *Fuller* v. *Alaska* doctrine should be considered by this court, since respondent may not be able to assert these legal grounds effectively through any other avenue of recourse.

In the course of his oral argument for Respondent, the District Attorney of Nassau County asked the Court to modify the rule of *Fuller* v. *Alaska* so as to provide that the *Lee* v. *Florida* doctrine would apply only in cases where both the wiretapping and the introduction of the wiretap evidence occurred after the date of the *Lee* decision. The District Attorney stated that there were many important cases in his office awaiting trial in which wiretap evidence was a vital element of the People's proof and that these cases could not be prosecuted successfully unless the *Fuller* v. *Alaska* rule was modified in the way he requested.

Mr. Justice Brennan objected to Respondent's request in this regard on the ground that, in *Kaiser*, both the wiretapping and the use of wiretap evidence at the trial occurred before the *Lee* decision was announced, that the *Fuller* doctrine was thus sufficient to protect Respondent's interest in *Kaiser* and, therefore, an adjudication going beyond *Fuller*, being unnecessary for the disposition

of the *Kaiser* appeal, would place a needless burden of judgment upon the Court.

Mr. Justice Brennan observed that there was another avenue of relief available: the District Attorney could seek a modification of the *Fuller* doctrine in these aforesaid pending cases by asserting a prayer for such modification in appeals from decisions in pre-trial hearings in those cases barring wiretaps from evidence on the authority of *Lee* and *Fuller*.

It is true that Section 518 of the Code of Criminal Procedure permits The People to appeal from an adverse ruling in a pre-trial search and seizure suppression hearing of the type provided for in Section 813-c of the Code of Criminal Procedure. It is also true that a decision of the New York Court of Appeals seemingly proceeds upon the assumption that a wiretap hearing is subject to the provisions of 813-c and that The People may appeal from an Order of Suppression in such a wiretap pre-trial proceeding. (See *People* v. *Cohen*, 42 Misc. 2d, 403-405; 24 A.D. 2d 900, 2d Dept. 1965, affirmed without opinion in 18 N.Y. 2d 605). However, in the *Cohen* case, the defendant apparently did not assert the claim that the statutory right of appeal established in Section 518 was not broad enough to authorize appeals from pre-trial wiretap hearings.

Moreover, it might be argued that the doctrinal import of *Cohen* is uncertain. It is true that the Court of Appeals affirmed an order of the Appellate Division which, at the instance of a prosecutor appellant, had modified a trial court order vacating the wiretap order in question as based upon an inadequate affidavit. However, defendant's motion to suppress sought the suppression of evidence obtained by a physical search and seizure as well as that obtained by wiretapping. Thus it can be argued that *Cohen* does not authorize an appeal by the prosecution where the suppression involves wiretap evidence alone. That this conclusion is not without a certain plausibility is indicated

by the further fact that the branch of the motion seeking suppression of wiretaps was based in part on the theory that seized evidence was the fruit of illegal wiretapping and that it was necessary to pass upon the legal status of the wiretap evidence as a necessary prelude to determining whether the seized material was admissible in evidence (See *People* v. *Cohen*, 42 Misc. 2d 403, at page 409).

It is not suggested that Respondent accepts the foregoing analysis. Indeed, the trial court in *Cohen* seems to have proceeded upon the explicit premise that Section 813-c, the provision of New York law authorizing suppression hearings, applies equally to seized evidence and wiretap evidence (See 42 Misc. 2d, at page 405). However, since the Court of Appeals did not write an opinion in the case, it is not certain what rationale forms the basis of its assumption that the prosecutor could appeal the trial court's order suppressing wiretap evidence and seized evidence.

In addition, the Court of Appeals, in a decision announced after the trial court's order in *Cohen* but before the Court of Appeals' decision in Cohen, declared that the search and seizure suppression hearing authorized in Section 813-c could not be equated with the pre-trial wiretap hearing (*People* v. *McCall*, 17 N.Y. 2d 152, 156, 157).

Also, in *People* v. *Habel* (18 N.Y. 2d 148), decided by the Court of Appeals on July 7, 1966, *the same day on which it decided People* v. *Cohen*, the Court had under review that portion of the aforesaid Section 813-c which provides that an appeal may be taken by a defendant, notwithstanding a plea of guilty, where a motion for the return or suppression of property, papers or things unlawfully obtained is denied. The Court of Appeals held that recordings of conversations made pursuant to judicial orders authorizing eavesdropping under Section 813-a of the Code of Criminal Procedure are not "property" unlawfully obtained" within the meaning of Section 813-c and that defendants' appeals were properly dismissed.

(See also *People* v. *Laverne*, 14 N.Y. 2d 304, holding that oral statements heard during an illegal search were not within the ambit of Section 813-c).

Finally, it may be observed that Section 518, providing the circumstances in which an appeal by the prosecution is permitted, is located in Part IV of the Code of Criminal Procedure, which part is entitled "Proceedings in Criminal Actions Prosecuted by Indictment". Some of the pending cases in which office involving wiretaps were prosecuted *by information rather than indictment.*

In *People* v. *Dimmie* (42 Misc. 2d 521, aff'd without opinion in 15 N.Y. 2d 578) the County Court of Westchester County, New York, held that the right to appeal from a judgment of conviction rendered in a Court of Special Sessions is a privilege granted by Section 751 of the Code of Criminal Procedure and that the procedures set out in that section must be followed rather than the procedures set out in Section 521 of the Code, since the latter section, dealing with prosecutions by indictment, is inapplicable to appeals from Courts of Special Sessions.

Some of the pending cases involving wiretap evidence in Nassau County District Attorney's Office are pending in the District Court of Nassau County, a Court of Special Sessions. (See Section 230, Nassau County District Court Act.)

The County Court, in *Dimmie,* held that Section 751 provides for the taking of an appeal within 30 days after judgment by filing an affidavit with the Clerk of the Court and since defendant had not complied with this provision he had lost the right to appeal. The Court rejected the defendant's argument that his time to appeal had not expired because the provisions of Section 521 of the Code grant a defendant 30 days to appeal from the time a copy of the judgment of conviction with notice of entry is served upon him. The Court held in part:

"The appeal in this case could only be taken pursuant to section 751. It could not be taken pursuant to section 521. Defendant had no choice. The reason is apparent upon consideration of the main division of the code. Part IV, in which section 521 is included, pertains to "Proceedings in Criminal Actions Prosecuted by Indictment", while Part V, in which section 751 is included, pertains to "Proceedings in Courts of Special Sessions and Police Courts." These "Parts", insofar as they deal with appeals, are complete in themselves, and the provisions of one part do not apply to provisions of the other part unless expressly adopted. Part V contains no provision directly or by inference which can be construed as incorporating section 521 in the procedure relating to appeals from Special Sessions (*cf. People* v. *Cornell, supra*, p. 828).

In *People* v. *Omans* (306 N. Y. 375, *supra*) the defendant, in appealing from a judgment of conviction rendered in a Court of Special Sessions, served a notice of appeal on the Justice of the Peace, within the 30-day period after judgment. Prior to argument of the appeal in the County Court, the District Attorney moved to dismiss the appeal because of defendant's failure to serve an affidavit of errors as required by section 751: Counsel for defendant sought leave to cure the defect pursuant to section 524-a of the code, which pertains to correction of errors in perfecting an appeal. In affirming the dismissal of the appeal, Judge Froessel held for the Court of Appeals that the County Court did not have power under section 524-a to relieve defendant from his failure to comply with section 751. As was said of section 521 in *People* v. *Cornell* (*supra*) Judge Froessel wrote (p. 378) that "There is no provision in Part IV or V which may in anywise be construed as making section 524-a referable to the procedure prescribed in section 751".

Counsel for the defendant also argues that section 520-a of the code expressly provides that the provisions pertaining to appeals in sections 517 through 520 of the code shall supersede all other provisions of the code dealing with appeals in crimi-

nal actions, and by implication supersede the appeal procedure provisions of section 751. The argument is without substance, since section 520-a is expressly limited in its application to superseding only those other code appellate provisions which are in conflict with sections 517 to 520. Clearly, none of these sections is in conflict with section 751.

The only mention of appeals from Courts of Special Sessions to be found in the foregoing sections of the code mentioned in section 520-a is in section 517 (subd. 3, cl. [b]), which states that an appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action: "(b) to the county court of the county in which the conviction was had, from a conviction by a court of special sessions, police court, police magistrate or justice of the peace". Section 520-a was added to Part IV of the code by chapter 806 of the Laws of 1954. No change was made, however, in section 751, which has not been amended since 1941. In the absence of any specific pronouncement by our appellate courts, this court will follow the decision in *People* v. *Omans* (*supra*) and hold that section 751 of the code alone governs appeal procedure on appeals from Courts of Special Sessions to this court (*People* v. *Palmer, supra; People* v. *Van Slyke,* 31 Misc 2d 434 [1961]) and that section 521 is not applicable and does not govern such appeals."

It is uncertain to what extent the New York Court of Appeals presently subscribes to the rationale of the County Court's holding in *Dimmie,* since the Court of Appeals affirmed in *Dimmie* without an opinion. The County Court's approach in *Dimmie* is understandable, since Section 751 of the Code prescribed a special procedure to be followed in initiating appeals from judgments of Special Sessions Courts. Whether the Court of Appeals would hold Section 518 of the Code, providing for appeals by the prosecutor from decisions on suppression hearings, inapplicable to appeals from judgments of Special Sessions

Courts seems questionable. Admittedly, however, the issue is not free from all doubt and thus it could not be stated unequivocally that the law of New York clearly permits an appeal by The People from orders suppressing evidence in the District Court of Nassau County or in other Special Sessions Courts throughout the State.

Moreover, although the matter is not free from doubt, it may not be possible for The People to persuade the trial courts to convene pre-trial wiretap hearings analogous to search and seizure suppression hearings in cases where the defendant is merely asserting legal issues and raises no questions of fact which a hearing is required to resolve (See *People* v. *Alfinito*, 16 N.Y. 2d 81). In such situations, some trial judges may postpone until the trial a decision on the legal issues concerning the admissibility of wiretap evidence.

Under the law of New York, the People's right of appeal exists only to the extent that it is authorized by statute (See: Sec. 518, Code of Criminal Procedure; *People* v. *Fay*, 268 Ap.Div. 135). The New York statutory scheme does not permit an appeal by The People from an order or judgment rendered at a trial (See Section 518, CCP). Thus the People will be unable to appeal a ruling of inadmissibility, if it is made at the trial rather than at a pre-trial hearing.

Therefore, there exists the distinct possibility that the People will be denied the appellate recourse which would enable them to obtain modification of the *Fuller* v. *Alaska* doctrine so as to protect the public interest by avoiding the dismissal of important pending prosecutions and preventing criminals from invoking the *Lee* v. *Florida* rule so as to escape punishment and rehabilitation.

Furthermore, if The People are not able to obtain a pre-trial wiretap hearing in some cases or to appeal a decision in a pre-trial wiretap hearing, the People will be unable

to obtain appellate review of another contention which it has raised in this Court in this case—its claim that the recent enactment by Congress of the Omnibus Crime Control and Safe Streets Acts of 1968 abated and rendered inoperative the provisions of Section 605 (See p. 79 of Respondent's main Brief). Mr. Justice Brennan, in the aforesaid comments reflecting a reluctance to entertain The People's prayer for a modification of the doctrine of *Fuller* v. *Alaska*, indicated that the Court may be similarly disinclined to deal with The People's abatement argument.

This argument will be pertinent in all cases where wiretap evidence was obtained during the period prior to June 19, 1968, when Section 605 was in force. Various cases pending in the Nassau County District Attorney's Office are based upon the evidence obtained from such wiretaps and it is thus important that The People contrive some means of advancing the abatement claim effectively.

The People's contention in this regard is simply that Section 605 is not available to the defendant as the basis for an objection to the introduction of wiretap evidence since Section 605 is no longer in force, having been repealed on June 19, 1968, two days after the *Lee* decision, by the enactment in Congress of the aforesaid Safe Streets Act. Therefore, under the doctrine propounded by this Court in *Hamm* v. *Rock Hill* (379, 306), it follows that 605 abated and can not be validly invoked as a ground for relief.

The United States Department of Justice and the F.B.I. have taken the official position that 605 was not violated by wiretapping alone and that both a wiretap interception *and divulgence* were necessary to bring the statute into operation. They defined "divulgence" as publication outside of the governmental realm thus viewing as exempt from the bar of the statute all divulgence among cooperating law enforcement officers. (See Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195, 197-199, 1954; Rogers, The Case for Wiretapping, 63 Yale L.J.

792-3, 1954 Katzenbach 32 FRD 107; Hoover, 58 Yale L.J. 422-1949).

Respondent also asserts this argument in connection with its abatement contention since, if divulgence was necessary to the violation of Section 605, such divulgence can hardly be considered as legally objectionable after 605 has been repealed. It is true that some observers have viewed the Court's decision in the second *Nardone* case (*Nardone* v. *U.S.*, 308 U.S. 338) as indicating that interception alone is a violation of 605, but, in the later *Benanti* case) the Court placed the issue in doubt by expressly reserving the question. (See *Benanti* v. *U.S.*, 355 U.S. 96, page 100, n. 5.).

The abatement argument was not raised in either *Lee* v. *Florida* or *Fuller* v. *Alaska*. Nor, so far as Respondent is aware, were the contentions there advanced that mere interception does not violate 605 and that a divulgence occurring after 605 has gone out of existence is not ground for reversal of a State judgment of conviction.

Counsel for criminal defendants in Nassau County, and, presumably, in other jurisdictions in the State of New York, invariably make a pro forma objection to the admission of wiretap evidence. Counsel all know about, and are in the habit of citing, the *Lee* and *Fuller* cases as grounds for the exclusion of wiretap evidence. Thus pending cases based upon wiretaps obtained prior to June 19, 1968 (the date of 605's repeal) will probably all be dismissed if the Respondent herein is not able to obtain appellate recourse with respect to the wiretap issue. Jurisdictions in this State other than Nassau County and, indeed, jurisdictions throughout the country, are in a similar situation.

It is respectfully submitted that this Court should not hesitate to modify the *Fuller* v. *Alaska* rule in the manner prayed for by Respondent on the ground that such a decision will constitute dictum, since other retroactivity decisions of this Court contain a dimension of dictum.

There is no reason why this Court should not save from dismissal pending cases based upon wiretap evidence by modifying the *Fuller* v. *Alaska* rule or invoking the abatement doctrine, since it is now the public policy of this country (as expressed in the federal legislation of June 19, 1968) to permit official court ordered wiretapping and since the wiretaps in the aforesaid pending cases in New York were required by 813-a to be approved by Court Order under substantial safeguards analogous to, although not identical with, those mandated in the new federal legislation.

In view of the fact that the protective provisions of the new federal law are now in effect, there is nothing to be gained from a policy which permits pending criminal prosecutions to be defeated by the enforcement of a now repealed Section 605 in a manner in which it was never applied during the 34 year period in which it was in effect.

The foregoing discussion is respectfully presented by Respondent with the intent of aiding the Court in the difficult task of judgment in a case critically important in its implications for the future of law enforcement in a free society.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

WILLIAM CAHN
District Attorney, County of Nassau
State of New York
Attorney for Respondent
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
Assistant District Attorney
of Counsel

SUPREME COURT OF THE UNITED STATES

No. 62.—October Term, 1968.

Thomas R. Kaiser, Petitioner, v. New York. | On Writ of Certiorari to the Court of Appeals of New York.

[March 24, 1969.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was convicted in a New York trial court in 1966 on three counts of conspiracy to extort, attempted extortion, and coercion. The case for the prosecution rested principally on the content of two telephone conversations between the petitioner and one of his co-conspirators. Tapes and transcripts of those conversations were introduced at the trial over the petitioner's objection that they had been obtained by an unlawful wiretap. The conviction was affirmed by the Appellate Division of the Supreme Court of New York[1] and by the New York Court of Appeals.[2] We granted certiorari.[3]

The telephone calls in question were made in 1964 by the petitioner from outside New York City to a co-conspirator at a bar in Manhattan. The conversations were recorded by means of a device attached to wires of the central terminal box in the basement of the building in which the bar was located. This wiretapping was conducted pursuant to a warrant issued under N. Y. Code Crim. Proc. § 813–a, the statute with which this Court subsequently dealt in *Berger* v. *New York*, 388

[1] 28 App. Div. 2d 647, 282 N. Y. S. 2d 207.
[2] 21 N. Y. 2d 86, 233 N. E. 2d 818, 286 N. Y. S. 2d 801.
[3] 390 U. S. 1023.

U. S. 41, in reversing a conviction under the Fourth and Fourteenth Amendments.

The petitioner contends that the Fourth and Fourteenth Amendments as construed in *Berger*, as well as § 605 of the Federal Communications Act,[4] prohibited the introduction of the intercepted conversations and therefore require reversal of his conviction. For the reasons stated below, we reject these contentions and affirm the judgment of the New York Court of Appeals.[5]

Not until last Term in *Katz* v. *United States*, 389 U. S. 347, did this Court overrule its prior decisions that the Fourth Amendment encompassed seizures of speech only if the law enforcement officers committed a trespass or at least physically invaded a constitutionally protected area of the speaker.[6] *Olmstead* v. *United States*, 277 U. S. 438, explicitly held that wiretapping conducted without such an intrusion was not an unlawful search or seizure. That rule was not modified by *Berger* v. *New York*. The Court's discussion of *Olmstead* in *Berger*, while recognizing that other cases had negated the statements in

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[4] Section 605, 48 Stat. 1064, 47 U. S. C. § 605 (1964), reads in pertinent part as follows:

"[N]o person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

[5] The petitioner also contends that the prosecutor's references to the recorded conversations as "confessions" were so inaccurate and misleading as to deny him due process. We do not believe that that characterization of the evidence raises any substantial federal question. The jury was aware that the prosecutor was adverting to the overheard conversations and knew the circumstances under which the incriminating statements had been made. In contrast to the situation in *Miller* v. *Pate*, 386 U. S. 1, there was here no misrepresentation about evidence which the jurors were not themselves in a position to evaluate.

[6] See *Desist* v. *United States*, *ante*, at pp. 4–5.

Olmstead that conversations are never protected by the Fourth Amendment, cast no doubt upon "[t]he basis of the [*Olmstead*] decision"—"that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house." [7] Furthermore, the Court in *Berger* found the overbreadth of N. Y. Code Crim. Proc. § 813–a repugnant to the Fourth Amendment only to the limited extent that it permitted a "trespassory intrusion into a constitutionally protected area." [8]

Olmstead, then, stated the controlling interpretation of the Fourth Amendment with respect to wiretapping until it was overruled by *Katz*. And in *Desist* v. *United States*, — U. S. —, we have held today that *Katz* is to be applied wholly prospectively. Since the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule of the Fourth and Fourteenth Amendments. *Mapp.* v. *Ohio*, 367 U. S. 643.

Nor did § 605 of the Federal Communications Act require exclusion of the intercepted conversations. Until our decision last Term in *Lee* v. *Florida*, 392 U. S. 378, state trial courts were free to accept evidence violative of § 605.[9] *Lee* extended the *Nardone* [10] exclusionary rule of § 605 to the States, but that decision has also been held to apply only prospectively. *Fuller* v. *Alaska*, 393

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[7] 388 U. S., at 51.

[8] *Id.*, at 44. See also id., at 43, 57, 60, 64, 69.

[9] *Schwartz* v. *Texas*, 344 U. S. 199.

[10] *Nardone* v. *United States*, 302 U. S. 379, holding that evidence seized in violation of § 605 by federal officers was not admissible in federal criminal trials. See also *Benanti* v. *United States*, 355 U. S. 96, holding that such evidence seized by state officers must also be excluded from federal trials.

U. S. 80. The wiretapping evidence was introduced at the petitioner's trial in 1966, long before the date of our decision in *Lee*.

Affirmed.

MR. JUSTICE BLACK concurs in the result for the reasons stated in his dissenting opinions in *Berger* v. *New York*, 388 U. S. 41, 70, and *Katz* v. *United States*, 389 U. S. 347, 364.

MR. JUSTICE DOUGLAS dissents.

SUPREME COURT OF THE UNITED STATES

No. 62.—October Term, 1968.

Thomas R. Kaiser, Petitioner, v. New York.	On Writ of Certiorari to the Court of Appeals of New York.

[March 24, 1969.]

Mr. Justice Harlan, dissenting.

It is conceded that petitioner's conviction rested largely upon evidence acquired by nontrespassory wiretapping conducted pursuant to a warrant issued under N. Y. Code Crim. Proc. § 813–a. The Court affirms the conviction on the ground that today's decision in *Desist* v. *United States*, — U. S. — (1969), necessarily dictates that evidence obtained by an illegal, nontrespassory wiretap will be inadmissible only if the tapping occurred after the date of the decision in *Katz* v. *United States*, 389 U. S. 347 (1967). The wiretapping in this case took place prior to *Katz*. However, the case is here on direct appeal, and for the reasons stated in Part I of my dissenting opinion in *Desist*, — U. S., at —, I would hold that petitioner is entitled to benefit from the *Katz* rule.

It is therefore necessary for me to consider whether petitioner's federal constitutional rights were violated by the wiretapping. Were I free to do so, I would decide this issue by inquiring whether, on the facts of this particular case and in light of New York decisions construing § 813–a, the wiretapping was valid under the Warrants Clause of the Fourth Amendment. See *Ker* v. *California*, 374 U. S. 23, 30–34 (1963); see also *Mapp* v. *Ohio*, 367 U. S. 643 (1961). However, I believe that this approach is foreclosed by this Court's decision in *Berger* v. *New York*, 388 U. S. 41 (1967). In *Berger*,

the Court held that a "bugging" pursuant to a § 813–a warrant violated the petitioner's Fourth Amendment rights because on its face the statute did not contain constitutionally required safeguards. It is true that the "bugging" in *Berger* involved a trespass and that the Court did not reach the question whether *Olmstead* should be overruled. But the holding that § 813–a was to be considered on its face rather than as applied depended in no way upon the fact of physical intrusion. The warrant procedure prescribed in § 813–a applies equally to "bugging" and to wiretapping. Hence, the Court's "on its face" approach would seem necessarily to embrace § 813–a wiretapping.

I dissented from the "on its face" approach adopted in *Berger*. See 388 U. S., at 89 *et seq.* I continue to disagree with that approach. Yet I think that *Berger* must be taken as having decided that a warrant issued pursuant to the version of § 813–a then in effect could not possibly satisfy the requirements of the Fourth Amendment.* Since I regard myself as bound by *Berger*, I am reluctantly compelled to conclude that the wiretap evidence introduced against petitioner was seized in violation of the Constitution, and that his conviction consequently cannot stand.

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*There were no amendments to § 813–a between June 1962, the date of the "bugging" in *Berger*, and July 1964, the date of the wiretapping in this case. Nor in my view is it necessary to decide whether *Berger* should be "retroactive." The present case was on direct appeal in the New York courts at the time *Berger* was decided, and petitioner is therefore entitled to invoke *Berger* under the rule advanced in Part I of my dissenting opinion in *Desist*.